

IN THE
Supreme Court of the United States
 October Term, 1983

FEB 13 1984

ALEXANDER L. STEVAS
CLERK

WESTERN COAL TRAFFIC LEAGUE; THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE; EDISON ELECTRIC INSTITUTE; NATIONAL COAL ASS'N; CONSUMER OWNED POWER COALITION; THE CHEMICAL MANUFACTURERS ASS'N; THE ALUMINUM ASS'N, INC.; THE FERTILIZER INSTITUTE; AMERICAN PAPER INSTITUTE; AMERICAN IRON AND STEEL INSTITUTE; COPPER DEVELOPMENT ASS'N, INC.; THE COMMITTEE ON TRANSPORTATION AND DISTRIBUTION OF THE SOCIETY OF THE PLASTICS INDUSTRY, INC.; INTERNATIONAL MINERALS & CHEMICAL CORP.; ARKANSAS-MISSOURI POWER CO.; ARKANSAS POWER & LIGHT CO.; LOUISIANA POWER & LIGHT CO.; MISSISSIPPI POWER & LIGHT CO.; NEW ORLEANS PUBLIC SERVICE, INC.; POTOMAC ELECTRIC POWER CO.; PUBLIC SERVICE COMPANY OF INDIANA, INC.; SOUTH CAROLINA PUBLIC SERVICE AUTHORITY; CENTRAL ILLINOIS LIGHT CO.; IOWA POWER & LIGHT CO.; OKLAHOMA GAS & ELECTRIC CO.; SOUTHWESTERN ELECTRIC POWER CO.; CONSUMERS POWER CO.; COMMONWEALTH EDISON CO.; MADISON GAS & ELECTRIC CO.; NEW YORK STATE ELECTRIC AND GAS CORP.; PENNSYLVANIA POWER AND LIGHT CO.; UNION ELECTRIC CO.; WISCONSIN POWER & LIGHT CO.; WISCONSIN ELECTRIC POWER CO.; WISCONSIN PUBLIC SERVICE CORP.; CAROLINA POWER & LIGHT CO.; DUKE POWER CO.; SOUTH CAROLINA ELECTRIC & GAS CO.; VIRGINIA ELECTRIC AND POWER CO.; KERR-McGEE CORP.; ELECTRIC FUELS CORP.; ALABAMA POWER CO.; GEORGIA POWER CO.; GULF POWER CO.; MISSISSIPPI POWER CO.; SOUTHERN COMPANY SERVICES, INC.; GULF STATES UTILITIES CO.; NORTH DAKOTA PUBLIC SERVICE COMMISSION; NORTH DAKOTA STATE WHEAT COMMISSION; CHAMBER OF COMMERCE OF FARGO, NORTH DAKOTA; COASTAL STATES ENERGY CO.,

Petitioners,

v.

UNITED STATES OF AMERICA; INTERSTATE COMMERCE COMMISSION; ASSOCIATION OF AMERICAN RAILROADS; ATCHISON, TOPEKA AND SANTA FE RY. CO.; BURLINGTON NORTHERN R.R. CO.; CHESSIE SYSTEM; CHICAGO AND NORTH WESTERN TRANSPORTATION CO.; CONSOLIDATED RAILROAD COMPANY; DENVER AND RIO GRANDE WESTERN R.R. CO.; ILLINOIS CENTRAL GULF R.R. CO.; MISSOURI PACIFIC R.R. CO.; NORFOLK AND WESTERN RY. CO.; SEABOARD COAST LINE R.R. CO.; SOO LINE R.R. CO.; SOUTHERN PACIFIC TRANSPORTATION CO.; SOUTHERN RY. CO.; UNION PACIFIC R.R. CO.,

Respondents.

On Petition for Writ of Certiorari to the
 United States Court of Appeals for the Fifth Circuit

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

Dated: February 13, 1984

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APPENDIX A

**WESTERN COAL TRAFFIC LEAGUE
and its Members, et al., Petitioners,**

v.

**UNITED STATES of America and
Interstate Commerce Commission,
Respondents.**

**Nos. 81-4257, 81-4259, 81-4277, 81-4299, 81-4334,
81-4347, 81-4354, 81-4357, 81-4365 to 81-4369, 81-4373,
81-4415, 81-4423 and 82-4021.**

**United States Court of Appeals,
Fifth Circuit.**

Nov. 14, 1983.

**Petitions for Review of Orders of the Interstate Commerce
Commission.**

**Before CLARK, Chief Judge, BROWN, RUBIN,
REAVLEY, POLITZ, TATE, JOHNSON, WILLIAMS, JOL-
LY and HIGGINBOTHAM, CIRCUIT Judges.***

JOHNSON, Circuit Judge:

**Prior to 1976, the Interstate Commerce Commission (ICC)
had unfettered authority to review all railroad rates under the
"just and reasonable" standard promulgated by Congress.¹**

***Judges Thoms Gibbs Gee, Carolyn Dineen Randall, and Will Gar-
wood recused themselves and did not participate in the decision.**

**¹Former section 1(5) of the Interstate Commerce Act provided that
"[a]ll charges made for any service rendered or to be rendered . . . shall
be just and reasonable and every unjust and unreasonable charge . . .
is prohibited and declared unlawful." The issues in this case are
reflected in the revised language of the recodification and amended
Act which now qualifies the reasonableness requirement: "If the Com-
mission determines . . . that a rail carrier has market dominance over
the transportation to which a particular rate applies, the rate estab-
lished by such carrier must be reasonable, 49 U.S.C. 10701a(b)."**

Then, through enactment of the Railroad Revitalization and Regulatory Reform Act of 1976 (the 4R Act),² Congress sought to reduce regulatory restraints on railroad pricing decisions.³ Under the 4R Act, the ICC now has jurisdiction to review a rate only if it determines that the carrier can exclude effective competition to the extent that the carrier has "market dominance," defined as "an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies."

Whether the ICC, in administering the "market dominance"⁴ standard, may consider evidence of product and geographic competition is the issue before the *en banc* Court.⁵ A divided panel of this Court concluded that the 4R Act "limits the definition of market dominance to transportation of the same product from the same origin to the same destination." See *Western Coal Traffic League v. United States*, 694 F.2d 378, 383 (5th

²Pub.L. No. 94-210, 90 Stat. 31 (1976); to be incorporated into the U.S.Code as part of the Revised Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.*

³See § 101 of the 4R Act.

⁴Market dominance was defined originally as "an absence of effective competition from other carriers or modes of transportation for the traffic or movement to which a rate applies." Pub.L. No. 94-210, § 202(b), 90 Stat. 31 (1976), codified at 49 U.S.C. § 1(5)(c) (1976). That language was revised and re-enacted without substantive change when the Interstate Commerce Act was recodified in 1978.

⁵Product competition refers to competition generated as a result of the availability of substitute products. For example, if a power plant in Texas generally operated on coal transported by rail from a mine in Wyoming but also could operate on natural gas from a field in Wyoming, the indirect competition from the natural gas industry would constitute "product competition." Geographic competition refers to transportation of the same product from a different location. For example, if the Texas power plant could obtain coal from a source other than the mine in Wyoming (*i.e.*, Pennsylvania), the indirect competition from the Pennsylvania mine would constitute geographic competition.

Cir. 1982), *reh'g en banc granted*, Order of March 7, 1983. Since we conclude that such a result fails to afford the ICC the deference due under existing law and places undue emphasis upon certain terms contained in the 4R Act, we affirm the ICC's orders allowing consideration of product and geographic competition. We also affirm the ICC's guidelines as in conformance with the congressional directive to the ICC to establish standards and procedures to be utilized in making the market dominance determination.

I. *Background and Procedural History*⁴

Throughout the nineteenth century, railroads constituted the dominant mode of transportation in the United States. Unaffected by any meaningful competition, the railroads were able to set rates that often proved to be unjust and unreasonable. As Justice Fortas noted in *American Truck Associations v. Atchison, T. & S.F. Railroad Co.*, 387 U.S. 397, 87 S.Ct. 1608, 1613, 18 L.Ed.2d 847 (1967): "In this country, the railroads had a practical monopoly of freight transportation, and secret rebates, special rates to favorite shippers, and discriminations flourished." Hence, in 1887, the Interstate Commerce Act was enacted and virtually all interstate railroad rates became subject to exacting scrutiny under the just and reasonable standard set forth in the Interstate Commerce Act. 49 U.S.C. § 1(5) (1976).

By 1976, however, many of the justifications for extensive regulation of railroad rates no longer existed. The premise of railroad dominance had become outdated and, as the ICC found as early as 1971, "there are few significant commodities which are not practically susceptible to transportation by at least two competing modes of surface transportation." *Illinois Central Gulf Railroad—Acquisition G., M. & O., et al.*, 338 I.C.C. 805, 836 (1971). Additionally, as was noted by Congress

⁴For an exhaustive treatment of the history of the 4R Act see *Western Coal Traffic League v. United States*, 694 F.2d at 384-90.

in enacting the 4R Act, significant financial losses were being incurred by the railroads and extensive, industry-wide regulation was no longer justified. Sen.Rep. No. 499, 94 Cong.2d Sess. 2-3, reprinted at 1976 U.S.Code Cong. & Ad.News 14, 15-17. Nevertheless, recognizing that certain carriers still were unrestrained by effective competition, Congress refused to completely deregulate the railroad industry.

The 4R Act evidences Congress' intent to deregulate the railroad industry only in the areas in which effective competition exists. Today, in order for the ICC to intercede in ratemaking practices, it must make an initial, jurisdictional determination that the carrier has market dominance. The 4R Act defines market dominance as "an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies." 49 U.S.C. § 10701a(b)(1) (Supp. IV 1980). Significantly, however, Congress empowered the ICC to adopt "standards and procedures" for determining whether a railroad possessed market dominance.⁷

Soon after the enactment of the 4R Act, the ICC embarked upon its attempt to provide standards and procedures to determine the market dominance issue. The ICC's first attempt at establishing such standards and procedures occurred in *Ex Parte No. 320*. See *Ex Parte No. 320*, Spec.Proc. for Findings of Market Dominance, 353 I.C.C. 873, *modified*, 355 I.C.C. 12

⁷The pertinent statutory language, set forth in the 4R Act, § 202(b), codified at 49 U.S.C. § 1(5)(d) (1976), repealed by Pub.L. No. 95-473, § 4(b), (c), 92 Stat. 1337, 1466-70 (1978), was:

Within 240 days after the date of the enactment of this subdivision, the Commission shall establish, by rule, standards and procedures for determining in accordance with Section 15(9) of this part, whether and when a carrier possesses market dominance over a service rendered or to be rendered at a particular rate or rates. Such rules shall be designed to provide for a practical determination without administrative delay.

(1976).⁸ One of the many issues presented involved the role of product and geographic competition in determining whether a carrier possessed market dominance. Although the Department of Justice, Department of Transportation, and the railroad industry urged the ICC to consider evidence of product and geographic competition, the ICC determined that such evidence would not be considered. Two reasons for this initial conclusion were advanced by the ICC. First, the ICC concluded that such evidence would create complex antitrust-type litigation and, second, the ICC felt that the statutory definition of market dominance precluded consideration of such competition. See *Ex Parte No. 320*, 353 I.C.C. at 904-05.

The regulations initially advanced by the ICC in *Ex Parte No. 320* underwent judicial attack in *Atchison, T. & S.F. Railroad v. ICC*, 580 F.2d 623 (D.C.Cir.1978). As in the case *sub judice*, a major issue before the D.C. Circuit involved the ICC's refusal to consider geographic and product competition. Although the D.C. Circuit ultimately upheld the ICC's regulations, finding "sufficient basis in the statutory language and purpose to merit our deferral to the Commission's view," *id.* at 634, the court noted that the ICC's construction "may appear to some as an attempt to attribute excessive significance to a terse statutory clause." *Id.* In concluding, the D.C. Circuit emphasized that its role was one "of deference and deferral" and noted that "[t]he Commission will be in a position to evaluate the regulation more fully in light of experience." *Id.*

After several years of experience with the regulations promulgated in *Ex Parte No. 320* and after completion of several studies,⁹ the ICC proposed removal of many of the cost

⁸See *Western Coal Traffic League v. United States*, 694 F.2d at 385-86 for further explication of the provisions set forth in *Ex Parte No. 320*.

⁹See *Western Coal Traffic League v. United States*, 694 F.2d at 386 n. 33 and material cited therein.

presumptions outlined in *Ex Parte No. 320* and proposed that litigants present any relevant evidence on the issue of market dominance, specifically including evidence of geographic and product competition. See *Ex Parte No. 320 (Sub-No.1), Rail Market Dominance and Related Considerations*, 45 Fed.Reg. 3353 (proposed January 17, 1980). While the ICC was considering comments on its proposed decision, however, Congress enacted new legislation.

In an effort to hasten railroad rate deregulation, Congress, in 1980, enacted a second major deregulation statute, the Staggers Act. Staggers Rail Act of 1980, Pub.L. No. 96-448, 94 Stat. 1895, codified in various sections of 49 U.S.C. § 10101, *et seq.* By a new provision contained in the Staggers Act, 49 U.S.C. § 10709(d), Congress required the ICC to deregulate a rail rate insofar as the carrier's rate of return falls below a specified percentage of the costs incurred by the carrier in providing the service. Additionally, even if the rail rate is above that percentage, the ICC still must determine whether market dominance exists. 49 U.S.C. § 10709(a), (b). Although Congress did revamp the ICC's regulations in these respects, it did not alter the market dominance statute enacted in the 4R Act and, in fact, emphasized that it did not intend "in any way to restrict the ability of the Commission to apply [the market dominance] concept, both in its regulations and individual cases." H.Rep. No. 96-1430, 96th Cong., 2d Sess. 89 (1980), U.S.Code Cong. & Admin.News 1980, p. 3978, 4120. Also, it is important to note that Congress was aware of the ICC's stated intent to consider product and geographic competition when the Staggers Act was debated. See 359 I.C.C. at 736-37.

Finally, following enactment of the Staggers Act, the ICC instituted *Ex Parte No. 320 (Sub. No. 2)*, the proceeding that gave rise to this case, to consider changes in its market dominance rules. As noted previously, the ICC reaffirmed its decision to consider evidence of product and geographic competition in making the market dominance determination. On review in this

Court, the petitioners attacked the ICC's new rules on a variety of grounds, including a claim that product and geographic competition was inadmissible under the express terms of the 4R Act. A divided panel of this Court held that the ICC lacked statutory authority to consider evidence of product and geographic competition. Thereafter, this Court granted rehearing *en banc* and the case was orally argued before the *en banc* Court on June 7, 1983.

II. Product and Geographic Competition

The petitioners challenge the validity of the ICC's regulations allowing consideration of product and geographic competition. They contend that the regulations exceed the ICC's statutory authority.

We begin, as we must, with a recognition of the limited role this Court plays in reviewing an administrative agency's construction of its statutory authority and the regulations promulgated pursuant thereto. Far removed from the practical realities of the day-to-day regulation of this nation's railroads, we must defer to the agency's interpretation of the statute and affirm that interpretation if "it has a reasonable basis in law." See *Aberdeen & Rockfish Railroad Co. v. United States*, 682 F.2d 1092, 1096 (5th Cir.1982), quoting *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261, 88 S.Ct. 929, 935, 19 L.Ed.2d 1090 (1968). That the members of this Court might have construed the statute differently is inconsequential. *Batterton v. Francis*, 432 U.S. 416, 97 S.Ct. 2399, 2405, 53 L.Ed.2d 448 (1977). Moreover, when an agency, pursuant to congressional mandate, has adopted regulations designed to effectuate its statutory duties, this Court will not set aside such regulations unless the agency has exceeded its statutory authority or if its regulations so far depart from the statutory authorization that they can be interpreted as "arbitrary, capricious, an abuse of discretion, or otherwise no in accordance with law." 5 U.S.C. § 706(2)(A); *Batterton v. Francis*, 97 S.Ct. at 2405-06.

As we have seen, the 4R Act clearly evinces Congress' intent to deregulate the railroad industry only in areas in which effective competition exists. In both the 4R Act and the Staggers Act, Congress stressed its conviction that competitive forces, rather than regulations should be used to set price and service levels where effective competition prevails. Nonetheless, Congress clearly intended to retain the protections of ICC rate regulation in areas in which no effective competition prevails. In determining whether the ICC's decision to consider product and geographic competition exceeds its statutory authority, we must recognize Congress' stated policy of deregulating rail rates only in areas in which effective competition exists. "[W]e must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object or policy."¹⁰ See *Philbrook v. Glodgett*, 421 U.S. 707, 95 S.Ct. 1893, 1898, 44 L.Ed.2d 525 (1975).

¹⁰As we have seen, a divided panel of this Court held that the 4R Act's definition of market dominance precluded consideration of indirect competition (i.e., product and geographic competition) since the definition "refers to 'effective competition . . . for the transportation to which a rate applies,' not to competition *with* that transportation." *Western Coal Traffic League v. United States*, 694 F.2d at 390. Although the panel majority conceded that indirect competition could be as effective as direct competition and that consideration of indirect competition would increase the number of rates immunized from regulation, *id.* at 382, it nonetheless concluded that Congress' choice of the preposition "for" instead of "with" demonstrated congressional intent to preclude consideration of indirect competition. We are hesitant to rely heavily upon a vague congressional use of prepositions in determining the extent of the ICC's jurisdiction to review rail rates.

As the panel majority conceded, to preclude the ICC's consideration of indirect competition will increase the number of rates subject to ICC regulation. Such a result clearly is inconsistent with Congress' repeated attempts to deregulate the railroad industry. Congress stressed the need for deregulation in enacting the 4R Act and re-emphasized that need in enacting the Staggers Act. In light of this congressional intent to deregulate all rates subject to effective competition, we are most hesitant to resolve the market dominance issue on

The 4R Act does not contain a detailed congressional formula for determining market dominance. Instead, it contains a generally phrased test designed to achieve a stated goal — deregulation of rail rates subject to effective competition. Congress not only expected but required the ICC to undertake the task of developing “standards and procedures” for determining “whether and when a [railroad] possesses market dominance.” Quite clearly, the ICC was given broad statutory authority to prescribe standards and procedures to be utilized in facilitating railroad rate deregulation. Well-established precedent requires us to uphold the ICC’s regulations unless they are “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A).

The regulations adopted by the ICC in *Ex Parte No. 320* (Sub. No. 2) cannot be considered arbitrary, capricious, an abuse of discretion, or inconsistent with law. Adopted pursuant to congressional mandate, the regulations reflect considered judgment in light of practical experience. Although the ICC’s decision to consider product and geographic competition depart from prior ICC decisions, none can doubt the ICC’s authority

the basis of a prepositional controversy. As the Supreme Court has repeatedly held, “the width of administrative authority must be measured in part by the purposes for which it was conferred.” *Permian Basin Area Rate Cases*, 390 U.S. 747, 776, 88 S.Ct. 1344, 1364, 20 L.Ed.2d 312 (1967). The ICC’s administrative authority undoubtedly was created in an attempt to deregulate all rates subject to effective competition. We should not interpret the 4R Act in a manner inconsistent with that purpose. Moreover, even if the plain terms of the 4R Act suggest such a result, we must heed the Supreme Court’s directive that “even when the plain meaning [does] not produce absurd results but merely an unreasonable one ‘plainly at variance with the policy of the legislation as a whole’ ” the Court should follow that policy instead of the literal words. See *United States v. American Trucking Ass’n*, 310 U.S. 534, 543, 60 S.Ct. 1059, 1063, 84 L.Ed. 1345 (1970), quoting *Ozawa v. United States*, 260 U.S. 178, 194, 43 S.Ct. 65, 67, 67 L.Ed. 199 (1922).

to change its mind in light of experience. *American Truck Associations v. Atchison T. & S.F. Railroad Co.*, 87 S.Ct. at 1613 (1967). Certainly, regulatory agencies "are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday." *Id.*

The ICC advanced the following reasons in support of its decision to consider product and geographic competition in making the market dominance determination.

We believe that [our prior] interpretation was unnecessarily restrictive. There is no evidence in the 4R Act that we consider only "direct" competition from other carriers or modes. Since the traffic to which the rate applies faces competition from other sources or destinations of the same product or from substitute products the carriers transporting that traffic face "indirect" competition from other carriers "[E]ffective competition from other carriers or modes of transportation, for the traffic to which the rate applies" means that, if a carrier raises the rate for such traffic, then some or all of that traffic will be lost to other carriers or modes.

Additionally, the ICC responded to the contention that its new regulations were unmanageable by stating:

In general, geographic or product competition will be deemed to be present if it is established that alternative supplies of the same or a close substitute product exist and that carriers transporting these same or close substitute commodities from the various sources to the various destinations compete with one another for the traffic in question. Whether such competition is judged to be effective will depend on evidence concerning the substitutability of one supply source or destination for another or one product for another. If, in a particular case, the Commission finds that the evidence submitted is inconclusive, then such evi-

dence will be given minimal weight in our determination of market dominance. We believe that this is an improvement over our 1976 position that evidence of geographic and product competition be always and automatically excluded from every proceeding.

365 I.C.C. at 130.

Indeed, nothing in the 4R Act evinces congressional intent to preclude consideration of indirect competition. As we have seen, Congress simply sought deregulation of rail rates subject to effective competition. Refusing to set forth a rigid standard for determining when effective competition exists, Congress authorized the ICC to establish appropriate standards and procedures for determining when market forces suffice to regulate rail rates. The ICC is in the best position to determine whether product and geographic competition play a role in the day-to-day fluctuations in rail rates and whether consideration of such evidence is feasible within the requirements of the 4R Act. See *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 98 S.Ct. 1197, 1202, 55 L.Ed.2d 460 (1978). Nothing in the 4R Act requires the ICC to make its decisions in a regulatory vacuum ignoring the practical effects of indirect competition. Undoubtedly, if the ICC was required to ignore the effects of indirect competition, certain rates would become subject to regulatory intervention even though the rate is governed by market forces. Such a result flies in the face of Congress' stated policy of deregulation of rates subject to effective market control. As the Final Conference Report to the Staggers Act emphasized, "*Whenever there is effective competition, such competition should continue to function as the regulator of the rate rather than the Commission.*" Hence, we cannot conclude that the ICC exceeded its statutory authority by adopting regulations that will allow it to consider the effects of indirect competition on rail rates in determining whether market dominance exists under the 4R Act. The ICC's interpretation of the 4R Act, when viewed with the deferential at-

titude required under existing precedent, certainly has a reasonable basis in law. See *Aberdeen & Rockfish Railroad Co. v. United States*, 682 F.2d at 1096.

We also note that we find nothing inconsistent with this result in the Staggers Act. Indeed, the Staggers Act reflects a reinforced congressional intent to allow the ICC to continue to promulgate standards and procedures for making the market dominance determination. The Conference Commission Report specifically stated that Congress' action was "not intended in any way to restrict the ability of the Commission to apply this concept, both in its regulations and individual cases." H.Rep. No. 96-1430, 96th Cong.2d Sess. 88-89 (1980), U.S.Code Cong. & Ad.News 1980, 4120. This is particularly significant, since Congress was aware of the ICC's stated intent to consider product and geographic competition when the Staggers Act was debated. See I.C.C. at 736-77.

III. *The ICC's Market Dominance Guidelines*

The petitioners contend that the ICC's guidelines are at variance with the congressional directive to the ICC in the 4R Act to "establish, by rule, standards and procedures for determining . . . whether and when a carrier possesses market dominance Such rules shall be designed to provide a practical determination without administrative delay." Section 202(b). The panel majority held that the ICC's guidelines conform to the 4R Act's "rule" requirement, but declined to address petitioners' argument that the guidelines lacked the definiteness and predictability of standards and, hence, do not allow the ICC and parties to measure in a practical way whether there is effective competition in a particular situation. *Western Coal Traffic League v. United States*, 694 F.2d at 392. We have reviewed the ICC's guidelines and hold that they satisfy the congressional directive.

The ICC's guidelines do not, of course, enable a party to predict in each case whether market dominance exists. But, the

object of the "standard" requirement in the 4R Act was not to establish hard and fast rules for every situation; the myraid individual circumstances in the complex world of rail transportation make that an impossibility. The guidelines do, however, provide a detailed guide as to what the ICC considers relevant, the placement of the burden of proof, and how to present a case to the ICC. We must remain cognizant of the Supreme Court's direction "that the formulation of procedures [is] basically to be left within the discretion of the agencies to which Congress [has] confided the responsibility of substantive judgments." *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Counsel, Inc.*, 98 S.Ct. at 1202. Only experience will demonstrate the ability of the ICC to manage its new guidelines. As the D.C. Circuit noted in *Atchison, T. & S.F. Railroad v. ICC*, 580 F.2d at 640, "the courts remain open if the Commission is slothful or unwilling to undertake appropriate reconsideration and fine tuning in the light of experience." At this time, we cannot say that the ICC had failed to fulfill the congressional directive. Hence, we affirm the ICC's guidelines.

IV. Conclusion

For the foregoing reasons we affirm the ICC's decision to consider evidence of geographic and product competition. We also affirm the ICC's guidelines since they fulfill the congressional directive to establish standards and procedures for making the market dominance determination.

The original panel of this Court was presented with several issues that are not at issue before the *en banc* Court. See *Western Coal Traffic League v. United States*, 694 F.2d at 385-89, part III, sections 1, 2, 3, and 4. Judge Brown dissented only with regard to the majority's decision on product and geographic competition (part II, section 5). This *en banc* opinion overturns the original panel's opinion with respect to its decision on product and geographic competition (part III, section 5). In all other respects (part III, sections 1, 2, 3, and 4), the

panel's decision is adopted as the opinion of the *en banc* Court. Hence, all of the objections to the ICC's decision in *Ex Parte No. 320 (Sub. No. 2)* are rejected and the ICC's decision is **AF-FIRMED**.

ALVIN B. RUBIN, Circuit Judge, with whom REAVLEY, Circuit Judge, joins, dissenting.

The words of the 4-R statute are refreshingly simple and direct: market dominance exists when there is "an absence of effective competition *from other carriers or modes of transportation for the traffic or movement to which a rate applies*" (emphasis added). 49 U.S.C. § 10709(a) (Supp. IV 1980).¹ Congress gave the Commission no power to reinterpret these plain words but only the authority for 240 days to adopt "standards and procedures" for determining "whether and when a carrier possesses market dominance over a service rendered or to be rendered at a particular rate or rates." 49 U.S.C. § 1(5)(d) (1976).

Competition *for* a movement of coal by rail from a coal mine in Kentucky to a public utility in the City of Austin, Texas, exists only if some other carrier is willing to move that coal from Kentucky to Austin. That is competition for the "service rendered or to be rendered." That another railroad is able to move coal from a strip mine in Wyoming to Austin creates competition *with* the Kentucky-Texas movement but not competition *for* that movement. The Wyoming-Texas carrier is not offering the same service. Even more obviously, the offer by a pipeline to supply an alternate energy source, natural gas, provides economic competition *with* the Kentucky-Texas move-

¹The Staggers Act, passed in 1980, changed the wording of this definition, but, as the majority opinion concedes, effected no substantive change in it. 49 U.S.C.A. § 10709(a) (West Special Pamphlet 1983) ("an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies"). See *ante* slip op. 704, at ____.

ment but it is not competition *for* that movement. Such products have different physical properties and must be transported in a different manner. The Wyoming-Texas natural gas carrier is, therefore, not offering the same service. It is not competing for the transportation to which the market-dominant rate applies.

In neither case is there competition from other carriers or modes of transportation for the traffic or movement to which the challenged rate applies. That is the type of competition that the statute specifies, not competition from other products or from other geographic areas.

The majority opinion states that the panel opinion relied "heavily on a vague congressional use of prepositions." *Ante*, Slip op. 705, p. ____ at n. 10. The use of the preposition in the statute is not vague, but, in any event, it is not the sole basis for reading the statute as being limited to direct carrier competition.

"The 4R act speaks of 'the traffic or movement to which the rate applies' " an authority eminent in defining terms used in interstate commerce has said. "When used in this context in the transportation industry, the word 'movement' refers to transportation *from a single origin point to a single destination point, while the word 'traffic' commonly denotes transportation services from a named set of points to another point or set of points; from specific areas to rate groups or in blanket areas; or between stated mileage brackets on particular commodities in a given territory. There is no language in the legislation which would warrant the extension of the phrase the traffic or movement to which the rate applies, beyond transportation services which are comparable to that described in the issue tariff.*"²

The definition of the meaning the industry attributes to the words in the statute was not by some professed pundit but by the Commission itself, which surely should, after a century of

²Ex Parte No. 320 (Sub-No. 1), 353 ICC at 904-905 (emphasis added).

experience, be conversant with the industrial lexicon. The definition of these terms in the industry has not, I take it, changed since 1976. It was this clarity of language that led the Commission to say in 1976 that the market definition in the statute was "explicit."³

Four years later the definition that was once "explicit" is no longer exact. It has instead acquired "a range of possible interpretations which Congress left to the Commission to fix exactly."⁴ Even if it were permissible to adjust the interpretation somewhat, the same statute cannot either in good conscience or good English be read to say that what is black one day is white the next, that what is day one day is night the next, that what *must* be excluded one day must be permitted the next — or even five years later.

The congressional history does not indicate that the Commission was meant to consider geographic and product competition in determining whether a carrier has market dominance. The Senate Conference Report on the 4R Act merely states:

The Department of Justice had, however, suggested only the consideration of such evidence in rebuttal. *Id.*, at 633.

While the absence of effective competition test is not intended to strictly conform with the standards of the antitrust laws, it is intended that when the Commission administers the test *it will recognize the absence of forces which normally govern competitive markets.*" (Emphasis added.)

1976 U.S.Code Cong. & Ad.News 148, 163. Far from requiring the Commission to recognize the *presence* of product-geographic competition, this language mandates only that the Commission recognize the *absence* of competitive forces in the railroad industry.

³*Id.*, at 905.

⁴Ex Parte No. 320 (Sub-No. 2), 365 ICC at 129.

The Staggers Act demonstrates that Congress knew the economic significance of product-geographic competition and referred specifically to those factors when it thought them appropriate. Section 205(a)(1) of the act requires the Commission to initiate a proceeding to determine whether, and to what extent, "product competition" (defined by the statute to include both what we have called product and geographic competition) should be considered in determining the reasonableness of rates. The instruction is not set forth in the U.S. Code but is contained in the historical note following 49 U.S.C.A. § 10701a (West Special Pamphlet 1983). Section 205(a) expressly recites that this directive shall not be construed as altering the "meaning, use, or interpretation by the Commission, the courts, or any part of the term 'market dominance' The enactment of [Section 205] shall not be considered by the Commission in any proceeding, or by any court on an appeal from that or any other proceeding, to determine the proper scope of the term 'market dominance'" Pub.L. No. 96-448, § 205(a)(3)(B), 94 Stat. 1906 (1980).³

The Commission's interpretation of the statute would read "effective competition . . . for the transportation to which a rate applies" to mean "effective competition *with* the transportation." This disregards the words requiring competition "from other carriers or modes of transportation."⁴ Indeed,

³On May 14, 1981, the Commission issued a decision concluding that such competition would not be considered as a reasonableness issue. Ex Parte No. 320 (Sub-No. 2), Market Dominance Determinations, 365 I.C.C. 1 (1981), *petition for review filed sub nom. Association of American Railroads v. United States*, No. 81-2249 (D.C.Cir., filed Nov. 30, 1981), *transferred*, No. 82-4082 (5th Cir. Feb. 26, 1982), consolidated with No. 81-4257, *motion to sever granted*, June 17, 1982.

⁴49 U.S.C.A. § 10709(a) (West Special Pamphlet 1983). The Commission's interpretation would also ignore the clear implication of § 10709(b), directing the commission to determine whether the carrier proposing a challenged rate has market dominance "over the transportation to which the rate applies."

it gives the statute only the meaning carried by the phrase "absence of effective competition" without any limitation whatever. There may be sound economic or administrative arguments for giving the Commission such free rein, but Congress simply did not do so. The Commission's studies showing that direct competition for a particular movement is not a sufficient economic test may indicate how much wiser Congress would have been had it allowed the Commission more latitude. Those studies and the Commission's recommendations may, indeed, persuade Congress to alter the statute. But the post-enactment economic studies tell us nothing about what the statute means.

In this part of the 4R Act, Congress did what courts have repeatedly criticized it for failing to do.⁷ It wrote clearly and succinctly. Indeed, the entire definition of market dominance is set forth in twenty words. Its brevity implies no ambiguity. When a statute is clear, it must be read to mean what it says. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 67, 102 S.Ct. 1534, 1537, 71 L.Ed.2d 748, 755 (1982); *United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246, 252 (1981); *Howe v. Smith*, 452 U.S. 473, 483, 101 S.Ct. 2468, 2475, 698 L.Ed.2d 171, 180 (1981).

Administrative agencies are given latitude in interpreting statutes they execute.⁸ When the statute requires interpretation we defer to their expertise and responsibility.⁹ But when

⁷See, e.g., *Regional Rail Reorg. Act Cases*, 419 U.S. 102, 133, 95 S.Ct. 335, 353, 42 L.Ed.2d 320, 347 (1974); *Pillsbury v. United Engineering Co.*, 342 U.S. 197, 200, 72 S.Ct. 223, 225, 96 L.Ed. 225, 229 (1952); *United States v. Evans*, 333 U.S. 483, 484-85, 68 S.Ct. 634, 635, 92 L.Ed. 823, 825 (1952); *United States v. Mason*, 611 F.2d 49, 52 (4th Cir.1979); *Zeigler Coal Co. v. Kleppe*, 536 F.2d 398, 406 (D.C.Cir. 1976).

⁸*Batterton v. Francis*, 432 U.S. 416, 425, 97 S.Ct. 2399, 2405, 53 L.Ed.2d 448, 456 (1977); *Williams v. St. Clair*, 610 F.2d 1244, 1249 (5th Cir.1980).

⁹*Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616, 625 (1965).

statutory words are plain, there is no reason to defer, for our competence and experience in statutory interpretation are surely greater. "[T]he courts are the final authorities on issues of statutory construction. They must reject administrative constructions of the statute . . . that are inconsistent with the statutory mandate . . ." *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37, 102 S.Ct. 38, 42, 70 L.Ed.2d 23, 33 (1981).

Our colleagues in the majority straddle the issue of interpretation. They do not read the statute either to require or to forbid the consideration of geographic competition. They simply defer to the Commission's decision. This might be appropriate were the statute unclear. But deference has already been paid to the Commission's 1976 reading of the statute to mean that the statute forbids such consideration. No court, including the majority, has found this interpretation to be in error. It is, I submit, not only permitted but compelled.

What the Interstate Commerce Commission has done is to perform a sleight-of-hand interpretation. It decided in 1981 that a statute permits it to consider evidence that, in a careful 1976 decision, it had read the self-same statute to preclude. The statute has not been amended. Nothing new has been discovered in its legislative history, and, despite the majority's effort to find some hint of later congressional sanction in the Staggers Act, the Commission itself has, after relying on that history, said that the Staggers Act contains nothing that directly supports the change. What the Commission has said is simply that it has changed its mind: its earlier "interpretation was unnecessarily restrictive."¹⁰ "[T]he thoroughness, validity, and consistency of an agency's reasoning are factors that bear on the amount of deference to be given the agency's ruling." *Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37, 102 S.Ct. 38, 44, 70 L.Ed.2d 23, 33 (1981). The

¹⁰Ex Parte 320 (Sub-No. 2), 365 ICC 128.

Commission has been neither thorough nor consistent here. See *General Electric Co. v. Gilbert*, 429 U.S. 125, 141, 97 S.Ct. 401, 411, 50 L.Ed.2d 343, 357 (1976) ("We have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency"); *United Housing Foundation, Inc. v. Foreman*, 421 U.S. 837, 857-859, 95 S.Ct. 2051, 2063-64, 44 L.Ed.2d 621, 635-36 (1975); *Fort Worth & Denver Ry. Co. v. Lewis*, 693 F.2d 432 (5th Cir.1982) (adhering to agency's "original and contemporaneous construction" of the Act in question). Only a few weeks ago, we denied deference to an agency decision because the agency had, "in the guise of interpretation," effected "a change in statutory intent." *Quarles v. St. Clair*, 711 F.2d 691 (5th Cir.1983).

After adopting a practice and using it in actual operation, an administrative agency may properly change its course and decide that the practice is not feasible. Experience, the old saw correctly runs, is the best teacher. For this reason, we defer to agency judgments based on experience. In this case, I would defer to a decision that the consideration of indirect competitive factors would not, as earlier thought by the Commission, unduly protract proceedings.¹¹ This is something that can be learned by experience. But the Commission has no greater experience in interpreting the statute now than it had in 1976. Indeed, it has had no experience with considering geographic or product competition as a factor in determining market dominance.

There is a "judicial — indeed, universally human — temptation to pass responsibility on to others by saying one is *describing* their will when one is, in truth, *prescribing* what is to be."¹² The Commission has attributed what it wills to a Congress that

¹¹Ex Parte 320 (Sub-No. 1), 353 ICC at 905.

¹²Tribe, *Toward a Syntax of the Unsaid: Construing the Sounds of Congressional and Constitutional Silence*, 57 Indiana L.J. 515, 523 (1982) (emphasis in original).

never intended this result. The hand is masked as the hand of Congress but the voice that speaks is in truth the voice of the Commission.

Congress knows exactly how to deregulate an industry when it chooses to do so. It has effectively deregulated rate control of air transportation.¹³ In adopting the 4R Act, it did not intend to eliminate the regulation of maximum railroad rates but only to lessen regulation when "competition is actually sufficient to insure that rates will not exceed a reasonable level." Its aim was, as the majority agrees, to deregulate rates only in the areas in which effective competition exists. But Congress defined what it meant by effective competition: it is competition from other carriers for the traffic or movement to which a rate applies. Our guide most unerring is neither legislative history, a history that is uncertain, nor the definition of effective competition revised by a Commission bent now on its own goal, heedless both of congressional intent and of cost to shipper or consumer, but what Congress itself said.¹⁴

An agency that changes its course by rescinding a rule and adopting a contrary one "is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance." *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Ins. Co.*, ___ U.S. ___, ___, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443, 457 (1983). "[T]he forces of change do not always or necessarily point in the direction of deregulation." *Id.* The Commission has not explained or even attempted to explain why what was "explicit" in 1976 is no longer so, why what was an in-

¹³The Airline Deregulation Act of 1978, Pub.L. No. 95-504, 92 Stat. 1705 (1978), Pub.L. No. 96-192, § 28, 94 Stat. 48 (1980) (codified in scattered sections of 49 U.S.C.).

¹⁴See *Rubin v. United States*, 449 U.S. 424, 430, 101 St. Ct. 698, 701, 66 L.Ed.2d 633, 638 (1981); *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 187, 98 S.Ct. 2279, 2298, 57 L.Ed.2d 117, 141 (1978).

dustry meaning five years before has suddenly changed, or why it has learned better how to read a statute in the interim. Even if it had discretion initially to interpret the statute, it has not "cogently explain[ed] why it has exercised its discretion in a given manner." (citations omitted). *Id.* at ____, 103 U.S. at 2869, 77 L.Ed.2d at 461. This failure ought to suffice for rejection of its change of heart. 4958.

For these reasons, I respectfully dissent from our abdication of our duty to interpret the laws of the United States and from the majority acceptance of a meaning that the statute cannot bear.

APPENDIX B

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Nos. 81-4257, 81-4259, 81-4277, 81-4299, 81-4334,
81-4347, 81-4354, 81-4357, 81-4365 to 81-4369, 81-4373,
81-4415, 81-4423 and 82-4021.

**WESTERN COAL TRAFFIC LEAGUE
and its Members, Et al.,**

Petitioners,

versus

**UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,**
Respondents.

**Petitions for Review of an Order of the
Interstate Commerce Commission**

**ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC**
(Opinion December 8, 1982, 5 Cir., 1982, __ F.2d __)
(March 7, 1983)

**Before CLARK, Chief Judge, BROWN, GEE, RUBIN, REAVLEY,
POLITZ, TATE, JOHNSON, WILLIAMS, JOLLY and
HIGGINBOTHAM, Circuit Judges.***

BY THE COURT:

A member of the court in active service having requested a poll on the application for rehearing en banc and a majority of the judges in active service having voted in favor of granting a rehearing en banc,

*Judges Carolyn Dineen Randall and Will Garwood did not participate in the consideration of this order.

IT IS ORDERED that these causes shall be reheard by the court en banc with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

APPENDIX C

**WESTERN COAL TRAFFIC LEAGUE
and its Members, et al., Petitioners,**

v.

**UNITED STATES of America and
Interstate Commerce Commission,
Respondents.**

**Nos. 81-4257, 81-4259, 81-4277, 81-4299, 81-4334,
81-4347, 81-4354, 81-4357, 81-4365 to 81-4369, 81-4373,
81-4415, 81-4423 and 82-4021.**

**United States Court of Appeals,
Fifth Circuit.**

Dec. 8, 1982.

**Petitions for Review of Orders of the Interstate Commerce
Commission.**

Before BROWN, RUBIN and REAVLEY, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

The Railroad Revitalization and Regulatory Reform Act of 1976 (the 4R Act)¹ was designed to eliminate needless regulatory restraints on railroads and to prescribe rate-making practices that would both encourage effective competition and protect consumers.² As one of its measures to achieve this, Congress limited the authority of the Interstate Commerce Commission to suspend a railroad rate on the basis that it is unjustly or unreasonably high. The Commission now has no jurisdiction to

¹Pub.L. No. 94-210, 90 Stat. 31 (1976), to be incorporated into the U.S.Code as part of the Revised Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.*

²Senate Conference Report No. 595, 94th Cong., 2d Sess. 134, *reprinted* at 1976 U.S.Code Cong. & Ad.News 14, 148, 1949.

review any rate unless it finds that the rail carrier defending the rate can exclude effective competition for the transportation to which the rate applies. The carrier's power to exclude such competition is called "market dominance."

The Commission has adopted what it terms guidelines, but considers to be regulations, for deciding whether a carrier has market dominance. Under the guidelines, the Commission may consider evidence that other carriers or modes of transportation compete for the same movement of the product to which the rate applies. Evidence is also admissible that transportation of substitute products (product competition) or transportation of the same product from other places (geographic competition) provides less direct, but potentially equally effective competition. When such evidence is considered, the number of rates immunized from regulation is increased.

Several organizations representing businesses and consumers that would be adversely affected by increases in various rail rates challenge the validity of the regulations on the ground that they exceed the Commission's statutory authority and on the further ground that the regulations do not comply with the Commission's statutory mandate to promulgate standards and procedures that facilitate market dominance determinations.

They also challenge other Commission decisions in the same regulations. The Commission has announced that user investments in rail-related facilities will not create a presumption of market dominance. Evidence of investments made in the future will not be admitted to show market dominance; evidence of past investments will be admitted but will create no presumption. In addition the Commission has abandoned the presumptions of market dominance formerly drawn from market share data and from cost/price ratios.

The Commission is joined in defending its actions by the Department of Justice and a number of intervenors including the Association of American Railroads and several railroad companies.

We conclude that the statute limits the definition of market dominance to transportation of the same product from the same origin to the same destination. The Commission's definition of market dominance is, therefore, invalid. Because the Commission must reconsider its definition, and must revise the standards and procedures adopted to implement it, any evaluation of those standards and procedures in their present form is unnecessary. We conclude, however, that the Commission did not exceed its statutory authority in adopting guidelines that describe the kind of evidence it will consider and the weight it will give such evidence.

I.

We preface the factual background with a review of established precepts. The administrative agency charged with executing a statute has primary responsibility for determining the scope of its authority.³ A reviewing court may not set aside the agency's interpretation of the statute that authorizes it to act merely because the judges would have interpreted the statutory language differently.⁴ When, pursuant to congressional mandate, an agency adopts regulations to implement the statute it is charged with administering, the agency's interpretation of the

³*Batterton v. Francis*, 432 U.S. 416, 425, 97 S.Ct. 2399, 2405, 53 L.Ed.2d 448, 456 (1977); *Udall v. Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616, 625 (1965); *Williams v. St. Clair*, 610 F.2d 1244, 1249 (5th Cir.1980); *Beleneke v. SEC*, 606 F.2d 193, 197 (7th Cir.1979); *Atchison, T & S.F. Ry. Co. v. ICC*, 580 F.2d 623, 629 (D.C.Cir. 1978).

⁴*Herweg v. Ray*, ____ U.S. ____, ____, 102 S.Ct. 1059, 1067, 71 L.Ed.2d 137, 147-48 (1982); *Batterton v. Francis*, 432 U.S. at 425-26, 97 S.Ct. at 2405, 53 L.Ed.2d at 456-57; *Unemployment Comm'n of Territory of Alaska v. Aragon*, 329 U.S. 143, 153, 67 S.Ct. 245, 250, 91 L.Ed. 136 (1947); *American Telephone & Telegraph Co. v. United States*, 299 U.S. 232, 235-37, 57 S.Ct. 170, 172, 81 L.Ed. 142 (1936); *Mid-Louisiana Gas Co. v. Federal Energy Reg. Com'n*, 664 F.2d 530, 534 (5th Cir.1981).

statute is entitled to even greater weight.⁵ Such regulations can be set aside only if the agency has exceeded its statutory authority or if its regulations so far depart from the statutory purpose that they can be stigmatized as "arbitrary or capricious," or "an abuse of discretion," or "otherwise not in accordance with law."⁶

These terms are necessarily imprecise for they do not express a formula. When Congress has chosen an administrative agency to fulfill both executive and quasi-legislative functions, a court reviewing the agency's reading of the governing statute must take into account both the congressional grant of discretion to the agency and the agency's expertise. Judicial review is not to be exercised with the zeal of a pedantic schoolmaster who grades papers for a single correct answer, but with the respect that is due responsible and experienced government officials themselves charged with duties of national importance.

Nonetheless, a reviewing court has the duty to determine whether an agency has transgressed the bounds fixed by Congress,⁷ else both judicial review and the constitutional stricture that ultimate legislative power not be delegated would both be meaningless. "[C]ourts are not bound to accept the ad-

⁵*Batterton v. Francis*, 432 U.S. at 425-26, 97 S.Ct. at 2405-06, 53 L.Ed.2d at 456-57; *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369, 93 S.Ct. 1652, 1660, 36 L.Ed.2d 318, 329 (1973); *Pacific Coast Medical Enterprises v. Harris*, 633 F.2d 123, 131 (9th Cir. 1980).

⁶5 U.S.C. § 706(2)(A) (1976); *Batterton v. Francis*, 432 U.S. at 425-26, 97 S.Ct. at 2405-06, 53 L.Ed.2d at 457; *American Trucking Association, Inc. v. United States*, 642 F.2d 916, 920 (5th Cir.1981); *Ami-Chanco, Inc. v. United States*, 576 F.2d 320, 326 (Ct.Cl.1978).

⁷*Intern. Broth. of Teamsters, Etc. v. Daniel*, 439 U.S. 551, 566 n. 20, 99 S.Ct. 790, 800 n.20, 58 L.Ed.2d 808, 820 n. 20 (1979); *Zuber v. Allen*, 396 U.S. 168, 193, 90 S.Ct. 314, 328, 24 L.Ed.2d 345, 360 (1969); *N.L.R.B. v. Brown*, 380 U.S. 278, 291, 85 S.Ct. 980, 988, 13 L.Ed.2d 839, 849 (1965).

ministrative construction of a statute regardless of consequences."⁸ While administrative agencies are expert in technical problems within their jurisdiction, they enjoy no special skill in statutory interpretation, an area in which courts are the final authority.⁹ For these reasons a court reviewing an agency's interpretation of its governing statute is not subject to the same constraints that apply when it reviews the procedures the agency adopts to fulfill its mandate.¹⁰

For almost a century railroad rates, unlike prices charged in most sectors of the American economy, have been stringently regulated. Tariff rates could be changed only after the long delay occasioned by administrative litigation and review under the substantive standards of the Interstate Commerce Act. In 1976 Congress found that, due in no small part to excessive regulation, railroad facilities had deteriorated, return on investment was far below the cost of capital, and a succession of major railroad bankruptcies had occurred.¹¹

At the same time, the central premise of maximum rate regulation, that the railroads had a transportation monopoly requiring control lest it become a monster, had itself become outdated. Although railroads dominated freight traffic in the United States when the Act was passed in 1887, railroads today carry only a third of intercity freight tonnage and compete in

⁸*Estate of Sanford v. Commissioner*, 308 U.S. 39, 52, 60 S.Ct. 51, 60, 84 L.Ed. 20, 27 (1939).

⁹*Fed. Elec. Com'n v. Dem. Senatorial Campaign Com.*, 454 U.S. 27, 31-32, 102 S.Ct. 38, 42, 70 L.Ed.2d 23, 29-30 (1981); *Hardin v. Kentucky Utilities Co.*, 390 U.S. 1, 14, 88 S.Ct. 651, 658-59, 19 L.Ed.2d 787, 797 (1968) (Harlan, J., dissenting), *quoted in Barlow v. Collins*, 397 U.S. 159, 166, 90 S.Ct. 832, 837, 25 L.Ed.2d 192, 199 (1970); 4 K. Davis, *Administrative Law Treatise* § 30.09 (2d ed.1958).

¹⁰*Compare Vermont Yankee Nuclear Power Corp. v. National Resources Defense Counsel*, 435 U.S. 519, 543-44, 98 S.Ct. 1197, 1211-12, 55 L.Ed.2d 460, 479 (1978).

¹¹Senate Rep. No. 499, 94th Cong., 2d Sess. pp. 2-3, *reprinted at* 1976 U.S.Code Cong. & Ad.News 14, 15-17.

such traffic with motor carriers, barges, pipelines, airlines, and other forms of transportation.¹² "[T]here are few significant commodities which are not practically susceptible to transportation by at least two competing modes of surface transportation[.]"¹³

Before 1976, all rail rates were required to be "just and reasonable."¹⁴ The Commission had authority to regulate any rates that did not meet this standard. In adopting the 4R Act, Congress sought to restore financial stability to the railroad industry by reducing regulatory restraints on railroad pricing decisions. The Act permits the Commission to consider whether a rate is reasonable only if the Commission first determines that the rail carrier has "*market dominance over the transportation to which [the] particular rate applies.*"¹⁵ "Market dominance" was originally defined as "an absence of effective competition from other carriers or modes of transportation *for the traffic or movement to which a rate applies.*"¹⁶ That language was subsequently revised, without substantive change, when the Interstate Commerce Act was recodified in 1978.¹⁷ In the 4R Act, Congress directed the Commission to establish, by rule, standards and procedures for making market dominance determinations.¹⁸

¹²*Id.*, reprinted at 1976 U.S.Code Cong. & Ad.News 16.

¹³Illinois Cent. Gulf R. — Acquisition — G., M. & O., et al., 338 I.C.C. 805, 836 (1971).

¹⁴Interstate Commerce Act, 49 U.S.C. § 1(5) (1976).

¹⁵49 U.S.C. § 10701a(b)(1) (Supp. IV 1980) (emphasis added).

¹⁶Pub.L. No. 94-210, § 202(b), 90 Stat. 31 (1976), codified at 49 U.S.C. § 1(5)(c) (1976) (emphasis added).

¹⁷Pub.L. No. 95-473, 92 Stat. 1337 (1978). It now reads "*transportation to which the rate applies*" instead of "*traffic or movement to which [the] rate applies.*" 49 U.S.C.A. § 10709(a) (West Special Pamphlet 1982).

¹⁸The pertinent statutory language, set forth in the 4R Act, §202(b), codified at 49 U.S.C. § 1(5)(d) (1976), repealed by Pub.L.No. 95-473, § 4(b), (c), 92 Stat. 1337, 1466-70 (1978), was:

Within 240 days after the date of the enactment of this subdivision, the Commission shall establish, by rule, stand-

The Commission was instructed to solicit and consider the recommendations of the Attorney General and the Federal Trade Commission in establishing its rules.¹⁹ The Act requires the Commission to make a jurisdictional market dominance determination within 90 days after the beginning of proceedings challenging the level of rail rates.²⁰ The Staggers Act, adopted in 1980,²¹ adds a further limitation: the Commission shall find that the rail carrier establishing the challenged rate does not have market dominance unless the rate exceeds a stated revenue/variable cost ratio.²²

III.

Soon after passage of the 4R Act, the Commission adopted Ex Parte No. 320, introducing rebuttable presumptions of market dominance. The Commission presumed that a carrier had market dominance if (1) the carrier handled 70 percent or more of the traffic of goods involved within the prior year (the "market share" presumption); (2) the rail rate yielded revenues exceeding 160 percent of the railroad's variable cost of service (the "cost" presumption); or (3) the shipper had made a substantial investment in rail-related plant or equipment precluding the use of alternative transportation (the "substantial investment" presumption).²³ The "cost" and "substantial investment" presumptions were rebuttable through the introduction of any

ards and procedures for determining, in accordance with Section 15(9) of this part, whether and when a carrier possesses market dominance over a service rendered or to be rendered at a particular rate or rates. Such rules shall be designed to provide for a practical determination without administrative delay.

¹⁹*Id.*

²⁰49 U.S.C.A. § 10709(b) (West Special Pamphlet 1982).

²¹Pub.L. No. 96-448, 94 Stat. 1895 (1980).

²²49 U.S.C.A. § 10709(d)(2) (West Special Pamphlet 1982).

²³Ex Parte No. 320, Special Proc. for Findings of Market Dominance, 353 I.C.C. 874, *modified*, 355 I.C.C. 12 (1976).

relevant evidence. The "market share" presumption could be rebutted only by evidence of direct carrier competition for the specific movement.

The Department of Justice, the Department of Transportation, and the railroads had urged that the definition of the relevant market should not be so confined but should extend more broadly to include product, geographic, and potential competition.²⁴ The Commission gave two reasons for rejecting that position. Such evidence would create complex anti-trust type litigation that could not be resolved within the 90-day statutory time limits²⁵ for making market dominance decisions. In addition, the Commission concluded that the statutory definition of market dominance precluded consideration of such competition.²⁶ The Commission also pointed out that, as experience was gained in the implementation of the concept of market dominance, refinements and modifications might be required. It would hold the proceedings open to permit reevaluation of the various standards and procedures, based on actual experience.²⁷

The Commission's regulations were upheld on judicial review, with the exception of a limited remand for purposes of clarifying the cost presumption. *Atchison, T. & S.F. Ry. v. ICC*, 580 F.2d 623 (D.C.Cir.1978). In that case, as here, a major issue before the Court concerned the Commission's treatment of geographic and product competition. The Department of Justice argued that the Commission erred in not permitting such evidence to be considered even to rebut the regulatory presumptions. In upholding the Commission's decision to exclude such evidence, the court found "sufficient basis in the statutory language and purpose to merit our deferral to the Commission's view."²⁸

²⁴353 I.C.C. at 900.

²⁵*Id.* at 905.

²⁶*Id.* at 904-05.

²⁷355 I.C.C. at 20.

²⁸580 F.2d at 634.

Commenting generally on the respective role of the Commission and the courts in implementing the market dominance regulations, the District of Columbia court stated:

Overall, the Court's role is one of deference and deferral. The Commission will be in a position to evaluate the regulations more fully in light of experience. That is an important feature of the administrative process. The courts remain open if the Commission is slothful or unwilling to undertake appropriate reconsideration and fine tuning in the light of experience.

580 F.2d at 623 (citations omitted).

In response to the court's remand for clarification of the cost presumption, the Commission issued a supplementary opinion.²⁹ In that opinion, the Commission noted that it was undertaking a further analysis of its market dominance definition that would, for example, "reveal how to treat evidence of geographic competition."³⁰ The Commission emphasized that it would look at all pertinent evidence and noted that, although certain kinds of competition are not relevant to computing market share, carriers could introduce evidence of geographic and product, as well as other, competition, to establish that effective competition exists.³¹

Ex Parte 320 (Sub-No. 1)

After several years of experience with the presumptions,³²

²⁹Ex Parte No. 320, Special Proc. for Findings of Market Dominance, 359 I.C.C. 735 (1979).

³⁰*Id.* at 735, n. 2 and accompanying text.

³¹*Id.* at 736, n. 7 and accompanying text.

³²Following the promulgation of Ex Parte No. 320, the ICC began to apply its market dominance rules in maximum rate reasonableness cases. The practical effect of the application of these standards, according to the ICC, was a substantial lessening in the number of rates over which the Commission exercised its regulatory jurisdiction.

and after completion of several studies,³³ the Commission pro-

See Implementation of the 4-R Act, Hearing Before the Sub-comm. on Surface Transp. of the Committee on Commerce, Science and Transp. of the United States Senate, S.Rep. No. 5, 96th Cong. 1st Sess. 46 (1979) (Statement of Hon. A. Daniel O'Neal). Chairman O'Neal noted that "between October, 1978 [the effective date of the market dominance rules] [sic] and December, 1978, the Commission precluded only 15 rate increases from taking effect out of several thousand filed and 267 protested [under what is now 49 U.S.C. § 10707]." *Id.* He went on:

This is in significant contrast to the period just before the enactment of the 4-R Act, when investigations and suspensions of rail rates ran at much higher levels. For example, in the first months of 1975, we suspended 75 rate schedules out of 170 protested. And if you translate that to a 2-year period, that would be 300 suspensions as opposed to 15 in the 2-year period after the act became effective.

Quite clearly, the market dominance concept [combined with procedural standards set forth in Section 202 of the 4R Act] have had a very great effect on rate and ratemaking where traffic is competitive.

Id. at 58.

In 1979, A. Daniel O'Neal, then the I.C.C.'s Chairman, reported to Congress, "We believe our market dominance regulations are an accurate implementation of the policies embodied in the 4-R Act." *Id.* at 58. The Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce issued a report praising the Commission's implementation of the market dominance regulations. See Committee Print 96-I.F.C. 40 (February, 1980).

³³In a report to Congress (ICC, *The Impact of the 4R Act Railroad Ratemaking Provisions*, October 5, 1977), the Commission analyzed, among other things, the impact of its market dominance regulations. That report concluded that approximately 50 percent of rail traffic would be market-dominant under the Commission's presumptions, absent rebuttal evidence. *Report* at 51. Subsequently, the Commission staff directed a research project by a consultant to analyze the market dominance concept in operation. In a report issued in 1979, the consultants concluded, *inter alia*, that (1) because of the complexity of rail

posed in Ex Parte No. 320 (Sub-No. 1)³⁴ removal of all but the cost presumption. In lieu of the eliminated presumptions, the Commission proposed that parties present any relevant evidence, including evidence of geographic or product competition. While the Commission was considering comments in that proceeding, however, Congress enacted new legislation which required modification of that proposal.

The Staggers Act Amendment

In 1980, Congress amended the market dominance section by restricting the situations in which the Commission might find market dominance. Section 202 of the Staggers Act directs the Commission to make a finding that the carrier lacks market dominance if the carrier shows that the challenged rate would yield revenues less than a given percent of variable cost.³⁵ Contrary to the Commission's previous cost presumption, the amended statute provides that a finding that a rate is equal to or greater than the statutory variable cost percentage "does not establish a presumption" of market dominance.

The Challenged Decision:

1. Elimination of the Market Dominance Presumptions

Following passage of the Staggers Act, the Commission adopted the challenged regulations. The market dominance

markets, general procedural rules must permit exceptions in individual circumstances; (2) very little rail traffic (under 5% long term, 10-15% short term) is market dominant if all transportation alternatives are considered; and (3) rebuttable presumption tests tend to be inaccurate. A.T. Kearney Inc., *A Study to Perform an In-Depth Analysis of Market Dominance And its Relationship to Other Provisions of the 4R Act, IX-4-6* (1979).

³⁴Rail Market Dominance and Related Considerations, 45 Fed.Reg. 3353 (Proposed January 17, 1980).

³⁵49 U.S.C.A. 10709(d)(2) (West Special Pamphlet 1982). The revenue/variable cost percentage threshold started at 160 percent in 1980 and increases each year, in five percent increments, to 180 percent in 1984.

presumptions have been eliminated and replaced with broader and more flexible guidelines. The primary reason for adopting the new approach is the Commission's conclusion that the presumptions do not necessarily reflect railroad market power and, therefore, yield inaccurate market dominance determinations.³⁶ The cost, market share, and substantial investment presumptions are found to be poor indicators of market dominance in the widely varying fact situations to which they must be applied. The new guidelines focus market dominance evidence on the transportation alternatives, if any, available to a shipper, and the feasibility of using each.³⁷

2. Cost Presumption

With respect specifically to elimination of the cost presumption, the Commission notes that the former presumption (*i.e.*, a rate exceeding 160 percent of variable cost establishes market dominance) is inconsistent with the Staggers Act.³⁸ That act

³⁶Ex Parte No. 320 (Sub-No. 2), Market Dominance Determinations, 365 I.C.C. 118, 120-21 (1981).

³⁷*Id.* at 131.

³⁸That act provides:

In making a determination under this section, the Commission shall find that the rail carrier establishing the challenged rate does not have market dominance over the transportation to which the rate applies if such rail carrier proves that the rate charged results in a revenue-variable cost percentage for such transportation that is less than—

- (A) 160 percent during the period beginning on the effective date of the Staggers Rail Act of 1980 and ending September 30, 1981;
- (B) 165 percent during the period beginning October 1, 1981, and ending September 30, 1982;
- (C) 170 percent during the period beginning October 1, 1982, and ending September 30, 1983;
- (D) 175 percent or the cost recovery percentage, whichever is less, during the period beginning October 1, 1983, and ending September 30, 1984; and

removes from Commission jurisdiction rates below a threshold figure set at 160 percent for 1980 and increasing annually to 180 percent in 1984. The Commission rejects suggestions that it adopt a higher ratio as a presumption of market dominance, noting that although price/cost ratios provide a convenient benchmark for deciding whether to look for market dominance (the role assigned by the jurisdictional provision of the Staggers Act), there are a number of reasons why a high price/cost ratio may not be indicative of true market power.

Ratios do not, for instance, tell us about the degree of market power possessed by the railroad, since they do not tell us whether a proposed rate will actually move traffic over an extended period of time. If the rate is high, shippers may find alternatives more attractive, forcing the rate back down again. Some may accept the high rate because of a preference for the carrier or because of a premium service associated with it. There are any number of reasons why a high price/cost ratio may not be indicative of true market power on the part of the railroad. Reliance on such ratios will, therefore, not only be misleading, but will preclude more relevant information from being introduced.⁴⁹

As an additional reason for eliminating the presumption, the Commission recites the difficulties in determining the variable costs of a rail movement.

(E) the cost recovery percentage, during each 12-month period beginning on October 1, 1984.

For purposes of subparagraphs (D) and (E) of this paragraph, the cost recovery percentage shall in no event be less than a revenue-variable cost percentage of 170 percent or more than a revenue-variable cost percentage of 180 percent.

49 U.S.C.A. § 10709(d)(2) (West Special Pamphlet 1982).

⁵⁰363 I.C.C. at 122.

Such costs depend on numerous factors that vary considerably from one movement to another. Since the simplicity of the cost test requires that a standard costing methodology be used, there is no way of avoiding the distorting inaccuracies of such a test. Many rates falling above a designated revenue-to-variable cost ratio would, on the basis of more accurate cost estimates, in fact be below it. Since more accurate cost information can, and very likely will, be presented as evidence, we think a price/cost presumption based on imperfect, though standard, cost estimates offers very little help.⁴⁰

3. *Market Share Presumption*

The Commission's reason for eliminating the market share presumption is the difficulty it has found in defining the scope of the market.⁴¹ The basic problem, the Commission points out, is that the factors determining the appropriate scope vary widely in individual situations. Moreover, the Commission asserts that even an accurate calculation of a carrier's share of a particular market reflects only the transportation alternatives selected in the past, as opposed to alternative sources currently available. The competitive implications of any given market share percentage, therefore, vary widely from case to case.

4. *Substantial Investment Presumption*

The Commission states that the substantial investment presumption was designed to protect shippers tied to a particular carrier by substantial rail-related investment.⁴² Its decision to eliminate the presumption is based on two considerations. First, the Commission has experienced difficulty in identifying pertinent elements of a shipper's investment in plant and

⁴⁰*Id.*

⁴¹*Id.* at 123.

⁴²*Id.* at 124.

equipment and in determining whether that investment makes use of another carrier or method impossible or impractical. Explaining its decision to eliminate the presumption, the Commission asserts that the "amount of rail-related investment is, by itself, a poor index of captivity."⁴³ As an example, it cites the purchase of coal cars, which may represent a new and substantial rail-related investment, yet not tie shippers to a particular railroad.

Second, the ability of shippers and carriers to enter into rail service contracts has reduced the importance of substantial investment in market dominance proceedings.⁴⁴ Shippers can now protect themselves, the Commission states, by negotiating with various carriers. When sufficient competition exists, carriers will have the incentive to offer contracts with reasonable terms.⁴⁵

The Commission adopts substantially the same policy with respect to long-term coal supply contracts, in which shippers tie themselves to particular carriers by negotiating long-term contracts with coal sources served by only one railroad.⁴⁶ The Commission has decided to place considerably less weight on the ex-

⁴³*Id.*

⁴⁴The Commission first liberalized contracting opportunities on its own initiative through the issuance of three notices in Ex Parte No. 358, Railroad Contract Rates, in 1978, 1979, and 1980. Ex Parte No. 358, Railroad Contract Rates, 45 Fed.Reg. 58189 (1978) (codified at 49 C.F.R. Part 1039); Ex Parte No. 358-F, Railroad Contract Rates, 45 Fed. Reg. 21719 (1980) (codified at 49 C.F.R. Part 1039). The policy announced in those proceedings was codified and clarified in Section 208 of the Staggers Act, 49 U.S.C. § 10713 (West Special Pamphlet 1982). Section 208(a) of the Staggers Act (49 U.S.C. § 10713) permits railroads and shippers to contract for rail transportation services. Contracts entered into under that section are exempt from all ICC regulation and the exclusive remedy for breach, as with any contract, is a court action. 49 U.S.C. 10713(i) (West Special Pamphlet 1982).

⁴⁵*Id.* at 125.

⁴⁶*Id.* at 126.

istence of long-term coal supply contracts executed after passage of the Staggers Act. It is concerned that shippers will not take advantage of opportunities to negotiate with carriers, but will rely instead on the old presumptions. In effect, the Commission has announced that it will not allow shippers to ensure its continuing jurisdiction over their rail transportation after October 1980 by tying themselves to a single carrier with substantial rail-related investments or long-term supply contracts.

5. *Geographic and Product Competition*

The Commission's guideline state that four major forms of competition affect rail transportation: (1) intramodal competition, *i.e.*, competition by railroads with railroads; (2) intermodal competition, *i.e.*, competition with railroads by other forms of transportation; (3) geographic competition; and (4) product competition.⁴⁷ Under each of these headings, the guidelines list representative factors relevant to the existence of competition.⁴⁸ The guidelines indicate that other forms of competition may also be important in individual circumstances and that the Commission is prepared to consider such evidence on a case-by-case basis.⁴⁹

Because of its prior position on the limited applicability of evidence concerning geographic and product competition, the Commission discusses at length its decision to include such evidence.⁵⁰ First, the Commission addresses its original interpretation of the statutory language and concludes that its reading was unnecessarily restrictive in focusing only on direct carrier competition and ignoring the indirect competition impact that geographic or product competition may have.⁵¹ The

⁴⁷*Id.* at 131.

⁴⁸*Id.* at 132-34.

⁴⁹*Id.* at 131.

⁵⁰*Id.* at 127-31.

⁵¹*Id.* at 128.

Commission finds nothing in the 4R Act or the Staggers Act that precludes revising its original restrictive interpretation.³²

In response to arguments that consideration of geographic and product competition is not possible within the time allotted, the Commission states that determining the presence or absence of effective geographic competition under the new guidelines should be manageable in most cases. Finally, the Commission addresses its previous concern that such evidence can not establish the existence of truly effective competition because geographic or product competition does not provide an immediate restraint on prices.³³ Although those forms of competition are less effective in restraining prices than a possible immediate loss of traffic, the Commission now recognizes the deterrent effect of a future loss of revenues on short-term market abuse.

In order to clarify the procedures for introducing evidence of market dominance, the Commission first notes that the railroad has the statutory obligation to present revenue/variable cost evidence if it seeks to demonstrate that the rate is below the statutory jurisdictional threshold. The railroad must also introduce evidence of product or geographic competition by identifying such competition. Once the railroad has made this identification, the party opposing the rate has the burden of proving that the product or geographic competition identified by the railroad is not effective.

Thus, the Commission's new guidelines reflect, in part, the positions urged originally by the agencies with statutory respon-

³²The Commission also found evidence that the Staggers Act suggested a more flexible interpretation. *Id.* at 129. This basis for change is now abandoned. Counsel for the Commission concedes that the Staggers Act contains nothing to support the change, while opposing any suggestion that it implies approval of the Commission's former interpretation.

³³*Id.* at 131.

sibility for advising it. After five years of experience with a more cautious approach, the Commission has found merit in the FTC's original criticism that use of presumptions as "shortcuts" obscures other considerations of relevance to the market dominance determinations.⁵⁴

IV.

The petitioners challenge the Commission's position that the statute gives it authority either to consider or not to consider evidence of geographic and product competition in determining market dominance. To evaluate this position, we first return to the statute. It refers to "effective competition . . . *for* the transportation to which a rate applies,"⁵⁵ not to competition *with* that transportation.

The statutory language must be read in the light of the manner in which the market dominance issue arises. When a shipper challenges a specific rate to transport a particular product from one place to another, the Commission has jurisdiction to review the reasonableness of the rate only because the rail carrier setting the rate has market dominance over that particular movement. Competition *for* a movement of coal by rail from a coal deposit in Wyoming to a utility company in Texas, for example, is created only if some other carrier is willing to move that product from the same origin to the same destination. The availability of coal moving by barge from a mine in Kentucky to the Texas utility (geographic competition) creates competition *with* the Wyoming-Texas movement but not competition *for* that movement. Similarly, suppliers of natural gas seeking to deliver it by pipeline to the utility may compete economically with the sellers of coal to supply an alternate energy source, but neither the natural gas producers nor the pipeline delivering their product compete *for the movement* to which the challenged rate applies.

⁵⁴See discussion in *Santa Fe*, *supra*, 580 F.2d at 630-31.

⁵⁵49 U.S.C.A. § 10709(a) (West Special Pamphlet 1982).

The congressional history does not indicate that the Commission was meant to consider geographic and product competition in determining whether a carrier has market dominance. The Senate Conference Report on the 4R Act merely states:

While the absence of effective competition test is not intended to strictly conform with the standards of the antitrust laws, it is intended that when the Commission administers the test *it will recognize the absence of forces which normally govern competitive markets.*" (Emphasis added.)

1976 U.S.Code Cong. & Ad.News 148, 163. Far from requiring the Commission to recognize the presence of product-geographic competition, this language mandates only that the Commission recognize the absence of competitive forces in the railroad industry.

The Staggers Act demonstrates that Congress knew the economic significance of product-geographic competition and referred specifically to those factors when it thought them appropriate. Section 205(a)(1) of the act requires the Commission to initiate a proceeding to determine whether, and to what extent, "product competition" (defined by the statute to include both what we have called product and geographic competition) should be considered in determining the reasonableness of rates. The instruction is not set forth in the U.S.Code but is contained in the historical note following 49 U.S.C.A. § 10701a (West Special Pamphlet 1982). Section 205(a) expressly recites that this shall not be construed as altering the meaning of the term "market dominance" as defined in 49 U.S.C. § 10709(a). Pub.L. No. 96-448, § 205(a)(3)(B), 94 Stat. 1905 (1980).⁵⁴

⁵⁴On May 14, 1981, the Commission issued a decision concluding that such competition would not be considered as a reasonableness issue. Ex Parte No. 320 (Sub-No. 2), Market Dominance Determinations, 365 I.C.C. 1 (1981), *petition for review filed sub nom. Association of American Railroads v. United States*, No. 81-2249 (D.C.Cir. filed Nov. 30, 1981), *transferred*, No. 82-4082 (5th Cir. Feb. 26,

The Commission's interpretation of the statute would read "effective competition . . . *for* the transportation to which a rate applies" to mean "effective competition *with* the transportation." There may be sound economic or administrative arguments for giving the Commission such free rein, but Congress simply did not do so. The Commission's studies showing that direct competition for a particular movement is not a sufficient economic test may indicate how much wiser Congress would have been had it allowed the Commission more latitude. Those studies and the Commission's recommendations may, indeed, persuade Congress to alter the statute. But the post-enactment economic studies tell us nothing about what the statute means.

While the Commission's original interpretation of the statute as excluding consideration of product-geographic competition is not decisive, it is not to be ignored. In deferring to the Commission's original interpretation, the District of Columbia Circuit commented "the construction may appear to some to attribute excessive significance to a terse statutory term." *Santa Fe, supra*, 580 F.2d at 634. The tentativeness of this endorsement does not constitute approval of a completely different reading. The statute is certainly brief: the entire definition of market dominance is set forth in twenty words. But brevity does not necessarily imply ambiguity. When a statute is clear we should read it to mean what it says, however succinctly.³⁷

We do not imply that, once the Commission makes a statutory interpretation, it is bound by a sort of agency stare decisis. Based on what the Commission learns from experience, new in-

1982), consolidated with No. 81-4257, motion to sever granted June 17, 1982.

³⁷*American Tobacco Co. v. Patterson*, ___ U.S. ___, ___ 102 S.Ct. 1534, 1537, 71 L.Ed.2d 748, 755 (1982); *United States v. Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246, 252 (1981); *Howe v. Smith*, 452 U.S. 473, 483, 101 S.Ct. 2468, 2475, 69 L.Ed.2d 171, 180 (1981).

formation, or new ideas, it may indeed alter its interpretations, overturn its administrative rulings, and adopt new practices. *American Trucking Associations, Inc. v. Atchison T. & S.F. Ry. Co.*, 387 U.S. 397, 416, 87 S.Ct. 1608, 1618, 18 L.Ed.2d 847, 860 (1967). Error is not to be perpetuated simply because it has been once made, and wisdom is not to be rejected merely because it comes late.

Here, however, there is no evidence the Commission has learned one iota more about the meaning of the statute or the direction of Congress than it knew five years ago. The Commission has merely altered its reading of what Congress directed a half-decade earlier because it considers that the new interpretation would produce more desirable results. This after-acquired wisdom cannot alter the statutory language and allow the Commission unfettered authority to define effective competition as it will.

V.

The petitioners also contend that the Commission's guidelines contravene the congressional directive in the 4R Act, that it

establish, by rule, standards and procedures for determining . . . whether and when a carrier possesses market dominance Such rules shall be designed to provide a practical determination without administrative delay.¹⁸

Necessarily our determination will require the Commission to reconsider its standards and procedures. However, because some of the questions raised and fully briefed in this appeal must be considered by the Commission and may, therefore, recur, we now consider them.

The Commission, it is argued, has promulgated "guidelines" rather than "rules," and these do not establish standards or procedures that will permit a practical determination. It is of no

¹⁸This language was repealed as executed in 1978. See *supra* note 18.

moment that, for reasons it has failed to articulate, the Commission has clad its promulgation in the cloak of guidelines rather than rules. The Administrative Procedure Act³⁹ defines a "rule" as "the whole or part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency" The Commission followed the notice and comment procedures for rulemaking prescribed by the Administrative Procedure Act. 5 U.S.C. § 553 (1976). None of the petitioners challenges the fairness of the procedure or the Commission's compliance with the rulemaking procedures. Although the Commission's decision embodies statements of policy and interpretations, the Commission also clearly intended to announce a change in the method it would follow in making the market dominance determination, a determination affecting substantive rights.⁴⁰

In *American Trucking Associations, Inc. v. ICC*, 659 F.2d 452 (5th Cir.1981), we discussed the differences between guidelines and rules and the criteria to be applied in determining whether, in a given situation, the distinction is merely semantic. As we there held, the status of guidelines as "rules" is determined by their binding character.⁴¹ The Commission's guidelines describe the "obligations" of railroads and shippers (365 I.C.C. 131-32); direct shippers to "use these guidelines for preparation of rebuttal evidence" (*id.* at 132); and state that the Commission "will" give more or less weight to certain evidence (*id.* at 131) and "will" consider product and geographic competition

³⁹5 U.S.C. §551(4) (1976).

⁴⁰*Cf. American Bus Ass'n v. United States*, 627 F.2d 525 (D.C.Cir.1980).

⁴¹659 F.2d at 463. The fact that the Commission used the term "guidelines" is not controlling: it is the impact and not the phrasing that matters. Indeed, agencies often adopt policies having the status of rules without codifying them in regulations, guidelines or in other formal formats. See *Brown Exp., Inc. v. United States*, 607 F.2d 695 (5th Cir.1979).

evidence (*id.* at 135). In short, as in *American Trucking*, there are "sinews of command beneath the velvet words of the . . . guidelines." 659 F.2d at 463.⁶² The guidelines here involved are indeed rules by these criteria and the Commission's choice of nonmenclature is without legal significance. Thus, the Commission's guidelines conform to the 4R Act's "rule" requirement.

Whether or not the Commission can feasibly make market dominance determinations within ninety days based on its guidelines is a matter for it to determine, at least in the first instance. Whatever the complexity of the issues before it in determining market dominance, the Commission is the best arbiter of its ability adequately to consider those factors within the time allowed. *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524-25, 98 S.Ct. 1197, 1202, 55 L.Ed.2d 460, 467-68 (1978). We decline to tell the Commission in advance of any experience that its procedures prevent it from reaching a decision within the time allowed it by statute.

Petitioners also attack the sufficiency of the guidelines to constitute "standards," as Congress commanded. They argue that the guidelines lack the definiteness and predictability of standards and, therefore, do not allow the Commission and parties to measure in a practical way whether there is effective competition in a particular situation. Because our decision requires the Commission to develop new rules that may be more or less explicit than the present ones, we need not now decide how precise administrative declarations of policy must be to con-

⁶²The *American Trucking* test primarily identifies "rules" by whether the agency *intends* them to control the course of its future proceedings. The language just quoted shows that the ICC did so intend. For example, the Commission could not refuse to consider product competition where proved, nor could it direct that the shipper bear the burden of proof to show that railroad rates were above the variable cost threshold in a particular case without repeating its guidelines through rulemaking procedures. See 365 I.C.C. at 131-132.

stitute standards. For the same reasons, we decline to rule on the argument that the guidelines do not lend themselves to the "practical determination" of market dominance exacted by Congress.

VI.

In addition to its decisions concerning product-geographic competition, the Commission's guidelines eliminate the presumption of market dominance flowing from substantial shipper investment in rail-related plant or equipment. Instead, the 1980 guidelines announce that evidence of substantial investment made prior to October 1, 1980 (the date of passage of the Staggers Act) can be introduced as "an evidentiary tool."⁶³ Investments made after that date will not be considered. The petitioners contend that this arbitrarily excludes evidence of post-October 1, 1980 investments, and is unreasonable even as to investments made before that date.

As to pre-October 1, 1980 investments, the Commission has merely removed the presumption, rebuttable even in its original formulation, that a carrier has market dominance when affected shippers or consignees "have made a substantial investment in rail-related equipment which prevents or makes impractical the use of another carrier or mode."⁶⁴ The Commission's reasons for doing so have already been noted. As to post-October 1, 1980, investments, the Commission reasons that "contracts afford adequate protection to shippers with substantial rail-related investment."⁶⁵ The Commission also deals with the argument "that such contracts encompass too short a period of time to cover the life of most rail-related investments."

For example, the Chemical Manufacturers Association indicated that, because of many uncertainties, railroads are generally reluctant to engage in long-

⁶³365 I.C.C. at 124.

⁶⁴365 I.C.C. at 123.

⁶⁵*Id.* at 124.

term contracts and that few of these contracts exceed 5 years. We do not deny that the protection afforded by a contract becomes less effective to the extent that the life of that contract is less than the life of the rail-related investment. However, we also emphasize that such problems are not beyond the control of the shipper. A long-term contract that protects the shipper for life of the investment should be available from a railroad who is encouraging that investment to be made, given the business that it means for the railroad. Furthermore, the historical failure of shippers to negotiate long-term contracts may, in part, have been due to the protection provided by the substantial investment presumption.

365 I.C.C. at 125.

Contrary to petitioners' assertion, the Commission is not forcing shippers who make substantial investments in rail-related equipment after the Staggers Act either to enter into a rail transportation contract or to forego maximum rate protection under the Interstate Commerce Act. Its decision encourages shippers to use whatever bargaining position they have to negotiate with carriers for transportation before making substantial investments. The Commission has professed a readiness to recognize the absence of transportation alternatives in particular situations and to afford those shippers adequate protection. This policy does not, on the face of it, seem arbitrary in an era where railroads and shippers are free to contract under the Interstate Commerce Act. To the extent that the Commission's guidelines encourage shippers with transportation alternatives to negotiate for transportation contracts, the guidelines are consistent with Congressional policy.⁴⁶

⁴⁶See H.Rep. No. 1430, 96th Cong., 2d Sess. 100, U.S.Code Cong. & Admin.News 1980, 3978, 4132 (1980) ("[T]he conferees intend to encourage shippers to contract")

Ultimate correctness, like truth, is difficult to ascertain. The Commission's reasons are plausible. Petitioners seek to demonstrate the untenability of the Commission's decision by argument rather than evidence. It is not our role to reassess the decision *de novo*, but only to reject it if it is arbitrary or capricious. Nothing in the record and nothing of which we might take judicial notice enables us to stigmatize that decision as willfully adopted, without support or reasonable explanation.

VII.

Finally, the petitioners protest elimination of the cost and market share presumptions of market dominance. Although the guidelines eliminate the presumptions, they do not arbitrarily exclude pertinent evidence. The Commission encourages the submission of evidence of "more accurate costing information which may include price-cost ratios and lead to more appropriate market determinations."⁶⁷ It also promises to consider evidence of current market shares and market share trends. The Commission's half-decade of experience with the presumptions equips it to decide whether the presumptions have accomplished their purpose. We lack the knowledge to evaluate the Commission's conclusions and the warrant to substitute our judgment. Certainly we cannot brand the conclusions arbitrary or capricious.

CONCLUSION

For these reasons, we hold that the Commission's rules allowing evidence of product and geographic competition to be considered in deciding whether a carrier has market dominance violates the limits contained in the statutory definition and is invalid. We express no opinion whether its "guidelines" are sufficient to be "standards" because they must be recast after new

⁶⁷365 I.C.C. at 122.

rules concerning market dominance are framed. We uphold the Commission's rules eliminating cost, market share, and substantial investment presumptions.

The petitioners invite us to provide interim rules for the Commission by reinstating its former guidelines. This we decline to do. The Commission itself is best equipped to decide how it will formulate regulations consistent with this opinion and what procedures it will adopt to handle its task in the interim.

The case is REMANDED for further proceedings consistent with this opinion.

JOHN R. BROWN, Circuit Judge, dissenting:

I dissent as to the Court's holding "that the Commission's rule allowing evidence of product and geographic competition in deciding whether a carrier has market dominance violates the limits contained in the statutory definition and is invalid," and to the reasons assigned to that result.¹

The Railroad Revitalization and Regulatory Reform Act of 1976 ("4R Act") constitutes a dramatic shift in government control of our nation's railroads, a shift "from reliance on government control to serve the public interest to reliance on market forces." Morton, *Contract Rates by Rail — A Tool in Ratemaking*, 49 I.C.C. Practitioners' Journal 413, 414 (1982). The 4R Act, as relevant here, restricted the I.C.C.'s jurisdiction over railroad rates to situations of "market dominance", but it left in the agency's lap the determination of appropriate standards and procedures relating to market dominance. The Commission, in Ex Parte No. 320, *Special Procedures for Making Findings of Market Dominance*, 353 I.C.C. 873, modified, 355 I.C.C. 12 (1976), adopted regulations to that end. It excluded geographic and product competition from the list of factors it would consider in making that jurisdictional determination.

¹I concur in all other holdings and the opinion's careful, exhaustive treatment of the background and development of the problem.

In the Staggers Rail Act of 1980, Congress reiterated its intent that the I.C.C. deregulate. Taking the hint, the I.C.C. abandoned market dominance presumptions and replaced them with broader, flexible guidelines. Reversing its prior position, it approved the consideration of geographic and product competition as factors indirectly relevant to determining competitive effect. The I.C.C., relying upon five years' experience with the original regulations, explained that its position had been too restrictive. Neither the 4R Act nor the Staggers Act, the I.C.C. stated, prevented such action.²

Any agency's freedom to change its mind, while neither guaranteed by the Constitution nor sanctioned by the Administrative Procedure Act, seems nonetheless a fundamental tenet in the effective and efficient administration of government. As times and business change, an agency may conclude that its policies should change as well. Prior policy, while not erroneous, simply no longer fits the bill. The Supreme Court has made that doubly clear as this Court recognized in *Aberdeen & Rockfish R. Co. v. United States*, 682 F.2d 1092 (5th Cir.1982):

[T]he Commission, faced with new developments or in light of reconsideration of the relevant facts and its mandate, may alter its past interpretation and overturn past administrative rulings and practice

[T]his kind of flexibility and adaptability to changing needs and patterns of transportation is an essential part of the office of a regulatory agency. Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

²I do not question the Court's note 52 and related text.

American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Railway, 387 U.S. 397, 416, 87 S.Ct. 1608, 1618, 18 L.Ed.2d 847 (1967).

Indeed, as it must, the majority recognizes this. *Ante*, p. ____ [slip op. p. 1488]. The I.C.C., prodded³ by Congress, made such a decision here. After a few year's experience in administering the 4R Act, it chose to amend its original stance on geographic and market dominance.

The case, as the Court puts it, comes down to the statutory terms limiting I.C.C. power to pass on rates to those in which the rail carrier has "market dominance over the transportation to which [the] particular rate applies, with "market dominance" being originally defined as "an absence of effective competition

³Congressional concern over the effectiveness of its actions and the response by the I.C.C. undoubtedly led to the hearing by the Subcommittee on Oversight and Investigations of the Committee on Interstate and Foreign Commerce. Petitioners' brief points out:

See, Implementation of the 4-R Act, Hearing Before the Sub-comm. on Surface Transp. of the Committee on Commerce, Science and Transp. of the United States Senate, S.Rep. No. 96-5, 96th Cong. 1st Sess. 46 (1979) (Statement of Hon. A. Daniel O'Neal). Chairman O'Neal noted that "between October, 1978 [the effective date of the market dominance rules] [sic] and December, 1978, the Commission precluded only 15 rate increases from taking effect out of several thousand filed and 267 protested [under what is now 49 U.S.C. § 10707]." (*Id.*) He went on:

This is in significant contrast to the period just before the enactment of the 4-R Act, when investigations and suspensions of rail rates ran at much higher levels. For example, in the first months of 1975, we suspended 75 rate schedules out of 170 protested. And if you translate that to a 2-year period, that would be 300 suspensions as opposed to 15 in the 2-year period after the act became effective.

Quite clearly, the market dominance concept [combined with procedural standards set forth in 4-R Act § 202] have

from other carriers or modes of transportation *for the traffic or movement to which a rate applies.*²⁸

With stark simplicity, in the Court's approach it is a prepositional controversy whether it is competition *for* the transportation or competition *with* that transportation.²⁹

This, in the words of the D.C. Circuit in its obviously reluctant, deferential approval of the I.C.C.'s order for not having credited the criticism of the Department of Justice and the F.T.C., "may appear to some as an attempt to attribute excessive significance to a terse statutory term." *Atchison, Topeka & Santa Fe Rwy. Co. v. I.C.C.*, 580 F.2d 623, 634 (D.C.Cir.1978).

If the application of one, but not the other, of two simple words is the key to permissible response the Commission could make to relentless congressional pressure to successively relieve rail transportation from a half century of burdensome governmental control and leave it more and more to the regulatory competitive forces of the market place, it would certainly seem to me to be the situation in which considerable latitude had to

had a very great effect on rate and ratemaking where traffic is competitive. *Id.* at 58.

And the Subcommittee issued a report praising the Commission's implementations of the then market dominance regulations (see, Committee Print 96-I.F.C. 40 (February, 1980).)

However one slices it, the heat — Congressional heat, that is — was on.

²⁸Pub.L. No. 94-210, § 202(b), 90 Stat. 31 (1976), codified at 49 U.S.C. § 1(5)(c) (1976) (emphasis added).

That language was subsequently revised, without substantive change, when the Interstate Commerce Act was recodified in 1978, Pub.L. No. 95-473, 92 Stat. 1337 (1978). The revised definitions, as currently set forth in 49 U.S.C. 10709(a) refers to "transportation to which the rate applies" in lieu of "traffic or movement to which the rate applies."

²⁹See Court's opinion at note 55 and related text. Ante at ____ [slip op. p. 1486].

be committed to the agency responsible for superintending the lessened regulation. This would include interpretation of the underlying statute. "The administrative interpretation of the Act by the enforcing agency is entitled to great deference." *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34, 91 S.Ct. 849, 854-55, 28 L.Ed.2d 158, 165 (1971).

It bears repeating what the Supreme Court said:

When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the Commission's application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings" . . . "Particularly is this respect due when the administrative practice at stake involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly when they are yet untried and new.

Udall v. Tallman, 380 U.S. 1, 16, 85 S.Ct. 792, 801, 13 L.Ed.2d 616, 625, (1965) (citations omitted),

The Court says little about the reasons, or more significantly, the reasons stated by the Commission in changing its views. The Commission, however, supplied a reasoned basis for its present holding that the statutory definition, properly construed, does not automatically preclude considering such evidence:

We believe that [our prior] interpretation was unnecessarily restrictive. There is no evidence in the 4R Act that we consider only "direct" competition from other carriers or modes. Since the traffic to which the rate applies faces competition from other

sources or destinations of the same product or from substitute products *the carriers transporting that traffic face "indirect" competition from other carriers . . .*

. "[E]ffective competition from other carriers or modes of transportation, for the traffic to which the rate applies" means that, if a carrier raises the rate for such traffic, then some or all of that traffic will be lost to other carriers or modes.

(emphasis added)

In disposing essentially of the "for" or "with" contention and in responding to contentions that consideration of product and geographic competition would not be attainable within the short time allotted, the Commission stated that with the new guidelines, determining the presence or absence of effective competition would be manageable. The I.C.C. described its conclusions and methods:

In general, geographic or product competition will be deemed to be present if it is established that alternative supplies of the same or a close substitute product exist and that carriers transporting these same or close substitute commodities from the various sources to the various destinations compete with one another for the traffic in question. Whether such competition is judged to be effective will depend on evidence concerning the substitutability of one supply source or destination for another or one product for another. If, in a particular case, the Commission finds that the evidence submitted is inconclusive, then such evidence will be given minimal weight in our determination of market dominance. We believe that this is an improvement over our 1976 position that evidence of geographic and product competition be always and automatically excluded from every proceeding.

We believe that this is an improvement over our 1976 position that evidence of geographic and prod-

uct competition be always and automatically excluded from every proceeding. [sic]

365 I.C.C. 130.

Both from the standpoint of Congressional awareness and revelations of the thinking of the I.C.C. the order under attack did not come as a bolt out of the blue. After Ex Parte No. 320, references began to appear in several Commission decisions indicating that product and geographic competition were relevant to the inquiry on market dominance.⁶

⁶The petitioner's brief advises us:

For example, in 1979, some two and a half years after its original decision in Ex Parte No. 320, the Commission stated in a footnote to a subsequent decision in the same proceeding that evidence of geographic and product competition should be admitted in market dominance proceedings. Ex Parte No. 320, 359 I.C.C. 735, 736 n. 7 (1979). This decision was issued in response to a remand from the D.C. Circuit seeking clarification on one aspect of the original decision. The footnote was unrelated to the purpose of the remand. The Commission also discussed geographic competition as being relevant to market dominance in two coal rate cases. In each of these cases the Commission found market dominance to exist, so no challenge was ever raised to its dicta concerning geographic competition. See Docket No. 37246, *Increased Rates on Coal, Midwestern Railroads, August, 1979*, (November 15, 1979) (unprinted); I. & S. No. 9199, *Unit Train Rates on Coal - Burlington Northern, Inc.*, 361 I.C.C. 651 (1979), *remanded on other issues, Iowa Public Service Co. v. Interstate Commerce Commission*, 643 F.2d 542 (8th Cir. 1981).

Also in Docket No. 37226, *Incentive Rates on Coal-Axial, Co. to Coletto Creek, Tx.* (January 15, 1980) ("Coletto Creek"), the Commission actually relied on evidence of geographic competition to make a finding of no market dominance. That decision was reversed and remanded by this Court in *Central Power & Light Co. v. United States*, 634 F.2d 137 (1980), *supplemented on rehearing*, 639 F.2d 1104 (1981), *cert. denied*, ___ U.S. ___, 102 S.Ct. 128, 70 L.Ed.2d 108 (1982).

And even more to the point was the Commission's decision on remand from the D.C. Circuit's decision in *Santa Fe*:

We will look at all pertinent evidence in arriving at a decision; see 353 I.C.C. 874 at 928.*

*There has been some misunderstanding on this point. While certain evidence is not germane to computing market share, proponents of a rate *may introduce evidence of potential competition from private carriage, alternative product competition or geographic competition* to show that effective competition exists.

Ex Parte No. 320, *supra*, 359 I.C.C. at 736.

Whatever influence these expressions might have had on the Congress the most reasonable interpretation of the legislative history of the Staggers Act is that Congress was aware that the Commission was itself reexamining the geographic and product competition issue and determined not to decide the issue legislatively, but to leave the matter to the Commission. That interpretation is supported by the Conference Commission Report:

[S]ince other parts of the Conference substitute provide additional rate freedom for rail carriers beyond those found in present law or under existing or proposed Commission regulations, the Commission must revise its market dominance regulations. In maintaining the term market dominance, in addition to statutory changes designed to provide more rate freedom to rail carriers, the conferees intend that *whenever there is effective competition*, such competition should continue to function as the regulator of the rate rather than the Commission. Maintenance of the "market dominance" standard is *not intended in any way to restrict the ability of the Commission to apply this concept*, both in its regulations and individual cases.

H.Rep. No. 96-1430, 96th Cong. 2d Sess. 83-89 (1980), U.S. Code Cong. & Admin. News 1980, 4120 (emphasis added).

Finally, rescuing the Court's example (notes 55-56 and related text Ante _____ [slip op. p. 1486-1487]) from the stricture of "for" and "with", the idea of geographic competition makes economic sense to this untutored, and if so, the Commission with its half century experience could concur. For example, a Chicago coal purchaser might have two alternate sources of supply: Southern Illinois and Wyoming coal being a fungible commodity the Chicago purchaser has no preference between the two. The Wyoming producer must compete with the Illinois rival, and transportation costs figure in his calculations. The carrier, if it hopes to secure the Wyoming business, must and will take the alternative into account — a pure case of geographic competition within a market.

The Court, embracing all of the standards by which all are bound on the scope of judicial review, nevertheless reaches a conclusion which trespasses on the domain reserved to the I.C.C. The result overrides the considerable deference due the Commission in its interpretation of the statute in the light of its experience and the meaning of the terms in the practical complex world of transportation.

There are areas "where angels fear to tread." This is one for judges.

APPENDIX D

EX PARTE No. 320 (SUB-No. 2)

**MARKET DOMINANCE DETERMINATIONS AND
CONSIDERATION OF PRODUCT COMPETITION**

Decided June 24, 1981

AGENCY: Interstate Commerce Commission.

ACTION: Notice of decision.

SUMMARY: After notice (45 F.R. 83342) and comment the Commission has determined to discontinue its market dominance presumptions and replace them with evidentiary guidelines. Evidence of geographic and product competition has been found relevant to the determination of market dominance. Elsewhere in the Federal Register today, we are removing the existing market dominance rules at 49 CFR 1109.1.

EFFECTIVE DATE: Thirty days from date of publication in the Federal Register.

FOR FURTHER INFORMATION CONTACT:

Richard Felder or Frank Gianfrancesco
(202) 275-7636 (202) 275-7383

SUPPLEMENTAL INFORMATION:

Before the Commission may examine the reasonableness of a railroad freight rate, it must make a determination that the carrier proposing the rate holds a position of market dominance in supplying the transportation to which the rate applies. This requirement originated in the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act)¹ and was continued with

¹Public Law 94-210, 90 Stat. 31.

some modification in the Staggers Rail Act of 1980 (Staggers Act).²

Regulations to implement the 4R Act provided that rebuttable presumptions of market dominance would arise in specified circumstances.³ We have now undertaken a reexamination of this use of presumptions in the determination of market dominance. Our notice instituting the present proceeding (45 F.R. 83342) announced our intent to eliminate the rebuttable presumptions of market dominance based on cost, market share and substantial investment.⁴ We also indicated our intention to eliminate a corollary of the substantial investment presumption which is based on the existence of long-term supply contracts. Finally, we announced that we would retain the more limited rate bureau presumption and consider the issue under the new rules restricting rate bureau involvement in ratemaking. We proposed to replace these presumptions or tests with broader and more flexible guidelines. Such an approach would allow for more accurate market dominance determinations on a case-by-case basis.

The Staggers Act now precludes our jurisdiction over the maximum reasonable level of rates unless the rate exceeds a given price/cost ratio and the carrier has market dominance over the transportation. The proponent carrier has the burden of proving the rate below the jurisdictional threshold. If a rate is determined to be above that threshold, the qualitative⁵ issues of

²Public Law 96-448, 94 Stat. 1895.

³49 CFR 1109.1.

⁴In an earlier notice, Ex Parte No. 320 (Sub-No. 1), *Rail Market Dominance and Related Considerations*, 45 F.R. 83302, we had also proposed removal of the existing presumptions but for the cost test. Passage of the Staggers Rail Act of 1980 required modification of that proposal.

⁵By qualitative investigation we mean one based on a variety of qualitative and quantitative evidence separate from the price/cost jurisdictional threshold test, and not dependent on predetermined statistical measures.

market dominance must still be resolved and the burden is on the shipper to do so.

We have decided to discontinue the use of rebuttable presumptions as a tool to develop this qualitative evidence and to replace them with general guidelines. These guidelines are set forth below. Before the guidelines are presented, we will clarify our reasons for eliminating the existing presumptions. Further, we have decided to continue to include geographic and product competition as evidentiary tools in market dominance determinations. A separate section is devoted to discussion of this issue.

Our decisions are framed in light of the comments received in response to the December 11, 1980 notice. All comments have been read and studied, even though not all of them are discussed here.

Procedural issues. — A number of the parties have filed motions.

The Allied Chemical Company filed a motion to terminate and rescind this proceeding. Other parties, such as the National Council of Farmers Co-operatives and Kimberly Clark Corporation have included similar motions in their statements. Basically, their arguments are that section 205 of the Staggers Act precludes the use of product competition as a criterion for judging market dominance and that the removal of the presumptions will leave the parties without the guidelines they are entitled to by section 202(b) of the 4R Act. Allied also argues that no information received in Ex Parte No. 320 (Sub-No. 1) may be used in the current proceeding and that the possibility of contract rates is insufficient reason for discontinuing the substantial investment rebuttable presumption.

The parties' reasoning is unpersuasive. As we note in our decision, that Congress directed the Commission, when determining market dominance, not to consider section 205 of the Staggers Act, does not prevent the Commission from modifying its in-

terpetation. Our decision replaces the rebuttable presumptions with evidentiary criteria; therefore, the parties are not left without guidelines. Further, we have not based this decision on information from Ex Parte No. 320 (Sub-No. 1). Our determinations have been based on the record in this proceeding. Finally, as we state in our decision, we believe shippers should be able to protect their long-term investments and supply contracts with contracts for rail transportation.

Consumer Owned Power Interests assert that we must issue an energy impact statement before we can revise our rules for market dominance. They are incorrect. Nothing in our revised rules will inhibit the transportation of coal. A market dominance finding is only an initial step in determining whether a rate is reasonable. Given this country's need for competitive sources of energy, rules for taking that initial step will not affect the movement of coal. Moreover, the rules we are promulgating allow truly captive shippers every opportunity to demonstrate their status. Railroads will not be able to abuse a monopoly position. We see no need, therefore, for an energy impact statement.

Elimination of Rebuttable Presumptions

Time has shown that the use of rebuttable presumptions has not enhanced the accuracy of market dominance determinations. While they did serve a useful purpose while we gained experience, the factors determining the degree of competition faced by a rail carrier are too numerous and too varied to be gauged, with any reasonable degree of accuracy, by so few measures. Further the measures themselves are often only approximations of the underlying conditions they are intended to reflect. For these reasons, the use of rebuttable presumptions in market dominance determinations often placed too much emphasis on quantitative evidence which did not fully reflect the circumstances of any given movement. This quantitative evidence was frequently offered at the expense of other evidence which,

though less subject to quantification, is more reflective of the degree of market power possessed by a rail carrier over certain traffic.

The comments of some of the participants, especially the railroads, in this proceeding indicate a basic agreement with these concerns. The Department of Transportation argued that the presumptions are "excessively restrictive" and that guidelines for submitting evidence would be more appropriate. Inland Steel agreed that the presumptions should be eliminated because they "are not universally suitable" and that cases should be treated individually. A much larger number of participants, however, opposed our proposal to discontinue the use of presumptions.

The Department of Energy and the Chemical Manufacturers Association, for example, argued that presumptions are necessary to expedite the review of cases and that this need is even more pronounced given the short-time period (90 days) allotted for such purposes. We agree that it is of benefit to all parties, including the Commission, that rate cases be reviewed as quickly and economically as possible. With appropriate guidelines as to what may be considered relevant evidence of market dominance, more accurate determinations can be made within the 90-day time period. Other participants, such as the Chlorine Institute, argued that rebuttable presumptions are useful in that they allow shippers to determine easily whether it is worthwhile to file a complaint. While this may be true to the extent the presumptions are inaccurate indicators of the presence or absence of market dominance, they may encourage rate complaints that should not be brought before the Commission and may discourage others that should. Finally, flexibility is necessary because of substantial differences among cases that preclude simple universally applicable rules. The use of presumptions has not facilitated proof of market dominance, to any great extent. Rather, presumptions have served, as a practical matter, to focus the issues. Once the rail carrier offered

evidence tending to challenge the presumption, more case-specific shipper evidence was required to obtain a market dominance finding.

1. *The cost test.*

A rebuttable presumption of market dominance will arise where the rate in issue exceeds the variable cost of providing the service by 60 percent or more.

As explained in the notice, the existing cost presumption is at odds with the rate threshold created by new section 10701a of the Staggers Act. The statutory threshold begins at 160 percent in 1980 and increases in increments to 180 percent after September 30, 1984. Rates below the threshold are now conclusively removed from our jurisdiction. For rates above the threshold, there is an open question as to market dominance. Under the cost presumption, there was an open question as to market dominance for rates below 160 percent of variable cost while rates above that level were presumed to reflect market dominance unless rebutted by more accurate cost evidence or other evidence to show effective competition. This old standard is, thus, clearly at odds with the Staggers Act.

The National Industrial Traffic League argued that, while the 160-percent cost test is inappropriate, it can be replaced with a higher revenue-to-variable cost ratio that is consonant with the jurisdictional thresholds established by the Staggers Act. While possible, it would be consistent with our other reasons for eliminating this presumption.

Rail Form A shares common problems with any standard methodology for estimating the variable costs of a rail movement. Such costs depend on numerous factors that vary considerably from one movement to another. Since the simplicity of the cost test requires that a standard costing methodology be used, there is no way of avoiding the distorting inaccuracies of such a test. Many rates falling above a designated revenue-to-variable cost ratio would, on the basis of more accurate cost estimates, in fact be below it. Since more accurate cost informa-

tion can, and very likely will, be presented as evidence, we think a price/cost presumption based on imperfect, though standard, cost estimates offers very little help.

Price cost ratios do provide a convenient benchmark for deciding whether to look for market dominance — and this is the role they are assigned by the jurisdictional provisions of the Staggers Act. But we question whether, even if calculated on the basis of accurate cost information, they reliably indicate the presence or absence of market dominance. Ratios do not, for instance, tell us about the degree of market power possessed by the railroad, since they do not tell us whether a proposed rate will actually move traffic over an extended period of time. If the rate is high, shippers may find alternatives more attractive, forcing the rate back down again. Some may accept the high rate because of a preference for the carrier or because of a premium service associated with it. There are any number of reasons why a high price/cost ratio may not be indicative of true market power on the part of the railroad. Reliance on such ratios will, therefore, not only be misleading; but will preclude more relevant information from being introduced. The guidelines established here will encourage submission of more accurate costing information which may include price-cost ratios and lead to more appropriate market dominance determinations.

2. Market share test.

A rebuttable presumption of market dominance will arise where the proponent carrier has handled 70 percent or more of the involved traffic or movement during the preceding year; the market share of the proponent will be deemed to include the share of any affiliates, and of any carriers with whom the proponent carrier has discussed, considered, or approved the rate in issue.

As we discussed in the notice, there are formidable difficulties associated with both the accurate calculation of a market share percentage and the interpretation of such a percentage in relation to market dominance. Such problems make impractical the use of market share information in the form of a rebuttable presumption. Many of the participants in this proceeding have

protested the elimination of the market share presumption. However, most of these did so by relying on the unconvincing argument that it has been used in the past. Some participants, such as DuPont and the Chemical Manufacturers Association, have contested our position that the calculation of the market share percentage is too complex.

To calculate accurately a market share percentage for the proponent carrier in a rate case, one must first determine the appropriate scope of the market. Since the purpose of a market dominance proceeding is to determine the degree of competition that the proponent carrier faces in regard to the movement in question, the appropriate scope of a market must be compatible with all movements of traffic that directly or indirectly exert competitive pressures on the challenged rate. The factors that determine the appropriate scope of a market vary widely from one case to another. This problem precludes any formula for market share determination which is both practicable and serviceable.

Another drawback of the market share presumption is that the competitive implications of any given market share percentage, even if accurately calculated, also vary widely from case to case. For example, the market share percentage does not measure the substitutability of one carrier or mode for another. Substitutability, which is what market share is primarily intended to measure, can be more accurately determined with a combination of evidence, both quantitative and qualitative. In short, observed market share percentages are more indicative of what transportation alternatives have been selected in the past as opposed to what alternatives are currently available.

We, therefore, conclude that use of market share information in the form of a rebuttable presumption detracts from the accuracy of market dominance determinations and, as a consequence, we have decided to eliminate the market share test. Evidence of current market shares and market share trends may, of course, be submitted in addition to or in conjunction with evidence suggested in the guidelines.

3. *Substantial investment/long-term supply contracts.* —
 a. *The substantial investment test.*

A rebuttable presumption of market dominance will arise where affected shippers or consignees have made a substantial investment in rail related equipment which prevents or makes impractical the use of another carrier or mode.

As indicated in the notice, this presumption was designed to protect shippers who make themselves captive to a particular carrier as a result of making substantial rail-related investment. We presented two reasons for our proposal to eliminate this presumption. First, it is very difficult to isolate pertinent elements of a shipper's investment in plant and equipment and to determine whether that investment makes the use of another carrier or mode impossible or impractical. Second, liberalizing the Commission's policy regarding contracts between shippers and carriers has reduced the importance of substantial investment in market dominance proceedings. This liberalization was achieved by the Commission on its own initiative through the issuance of three notices in Ex Parte No. 358, *Railroad Contract Rates*, in 1978, 1979, and 1980. More importantly, the policy enunciated in these proceedings was codified and clarified in section 208 of the Staggers Act (49 U.S.C. 10713). For these reasons, we proposed to remove substantial investment as a presumption and to consider it as an evidentiary tool only for investments made prior to February 21, 1980, the date of the last Ex Parte No. 358 notice.

Few of the participants in this proceeding supported the elimination of the substantial investment presumption. One of these, the Department of Transportation, underscored the limited usefulness of this presumption by pointing out that it has not been used very much in the past (only 3 out of 117 cases in 1979).

The overwhelming majority of participants, however, opposed removal of this presumption. We believe, however, that the amount of rail-related investment is, by itself, a poor index of captivity. The type of investment and a variety of other factors

can be of major or even overriding importance in many situations. For example, coal cars purchased by the shipper may represent new and substantial rail-related investment, yet not tie the shipper to a particular railroad. This problem precludes any method, that is both serviceable and practicable, for quantifying substantial investment and, as a consequence, makes impractical the use of such evidence in a rebuttable presumption. The main thrust of the objections concerned the soundness of the argument that contracts afford adequate protection to shippers with substantial rail-related investment. Some of the participants (e.g., the Chemical Manufacturers Association, Western Coal Traffic League, and the National Industrial Traffic League) argued that contracts do not afford protection to shippers who have already made substantial rail-related investments. In other words, such shippers would have little or no leverage in negotiating a favorable contract. This argument may be correct, but is inapposite to the reason for the substantial investment presumption in the first place. The presumption was designed to protect shippers that have transportation alternatives but lose these alternatives once a rail-related investment is made. Essentially, the presumption protected shippers from potential adverse consequences of their own business decisions, in an era when shippers could not negotiate contracts with the railroad simultaneously with their investment in rail-related facilities. Now that contracts are available for this purpose, the presumption is superfluous where sufficient transportation competition exists and the shipper can protect itself by negotiating with the various carriers and then obtaining a contract reflecting the agreed upon terms. It is our belief that when sufficient competition exists, carriers will have the incentive to offer to shippers contracts containing reasonable terms. We understand that contracts would afford little protection to shippers who would be captive irrespective of substantial investment in rail-related facilities. For these shippers, however, the existence of such investment and, therefore, our argument regarding contracts would be irrelevant considerations in a market

dominance determination. These shippers would be able to prove market dominance on the basis of other evidence regarding transportation alternatives.

The second argument advanced by participants questioning the protection afforded by contracts is that such contracts encompass too short a period of time to cover the life of most rail-related investments. For example, the Chemical Manufacturers Association indicated that, because of many uncertainties, railroads are generally reluctant to engage in long-term contracts and that few of these contracts exceed 5 years. We do not deny that the protection afforded by a contract becomes less effective to the extent that the life of that contract is less than the life of the rail-related investment. However, we also emphasize that such problems are not beyond the control of the shipper. A long-term contract that protects the shipper for the life of the investment should be available from a railroad who is encouraging that investment to be made, given the business that it means for the railroad. Furthermore, the historical failure of shippers to negotiate long-term contracts may, in part, have been due to the protection provided by the substantial investment presumption.

Many of the participants protested the February 21, 1980 cut-off date for investments that would continue to be given consideration in market dominance proceedings. In our notice, we said:

With regard to investment made subsequent to our February 21, 1980 policy statement, we do not think that a shipper should be able to invoke our jurisdiction merely because it has made a bad business decision — that is, an investment decision by which it in effect binds itself to rail service without taking advantage of the contractual protection it could have secured.

While we retain these views, we do not believe that the February 21, 1980 date is inappropriate, and that the appropriate cut-off date is the effective date of the Staggers Act. We recognize that, notwithstanding our several policy statements, considerable uncertainty remained in the minds of shippers and carriers

about the validity of contracts entered into between them. Once the matter became the subject of congressional debate, the uncertainty heightened. Only with enactment of the Staggers Act could contracts be entered into without any doubt as to their legality and method of enforcement. Therefore, we have decided to replace the February 21, 1980 date with October 1, 1980.

b. *Long-term supply contracts.* — The notice also addressed long-term supply contracts. Some utilities have argued that long-term coal supply contracts legally or economically preclude them from using coal from alternative sources and, as a consequence, they are captive to a particular railroad. In the notice, we emphasized that we will not make findings that a shipper is captive solely because it has entered into a long-term supply contract. While we indicated that we would consider the existence of such contracts in market dominance proceedings, we also noted that we would place considerably less weight on such evidence for coal supply contracts executed after October 1, 1980, for the same reasons discussed immediately above. While we recognize that they are not easy to negotiate, transportation contracts can now, in our view, protect shippers who wish to secure long-term supplies of coal. Coal supply contracts made after the above date should be made contingent upon a satisfactory transportation contract.

Some of the participants in the proceeding argued that coal supply and transportation contracts cannot be made simultaneously in many instances. They contend that when the construction of a new public utility is involved supply contracts are made years in advance of the actual shipment of coal. Railroads, they argue, are reluctant to engage in transportation contracts for traffic that will not begin to move until the future. While this argument may have some merit in some circumstances, we nevertheless do not find it credible that a shipper who is planning to ship many thousands of tons of coal over many years, and can get that coal from several sources, will not

find railroads ready and willing to compete for their transportation contracts. Supplier-carrier combinations could be played off against one another until the most acceptable contractual terms were reached with both. Indeed, the shipper's negotiations with the railroad may well strengthen its hand in bargaining with the supplier. As with substantial rail-related investment, this argument does not apply to shippers who would be captive irrespective of long-term supply contracts. Such shippers should be able to prove market dominance on the basis of other evidence.

In sum, we do not find compelling reasons to alter our position regarding long-term supply contracts.

4. Rate bureau test.

In any proceeding involving a determination as to market dominance where the evidence adduced establishes that the rate at issue has been discussed, considered, or approved under a rate bureau agreement filed with the Commission, pursuant to section 5a or 5b of the Interstate Commerce Act, a rebuttable presumption will arise that a carrier participating in the rate or, in such discussion, or consideration does not provide effective competition to the proponent rail carrier for the involved traffic or movement.

As indicated in the notice, this test was never intended to be a presumption of market dominance but rather an evidentiary tool. We expressed our intention to continue considering such evidence in market dominance proceedings as long as rate bureau involvement in ratemaking continues. We also noted that section 219 of the Staggers Act gives the Commission authority (after April 1, 1982) to curtail rate bureau activity. Our intention would be to change even this limited rate bureau presumption to reflect any changes made in regulations governing rate bureau operations.

This proposal was not contested by the participants in this proceeding.

Geographic and Product Competition

The December 11, 1980 notice also responded to the question posed in section 205 of the Staggers Act, as to whether we

should consider product competition in determining whether rates are unreasonably high. Section 205 of the act defines product competition such that it encompasses geographic competition as well. We did the same in the notice, and in the notice voiced the tentative conclusions not to consider product and geographic competition in rate reasonableness proceedings, but to consider both of them, for purposes of gauging effective competition, in market dominance determinations.

On May 18, 1981, we issued a decision concluding that product and geographic competition would not be considered as a reasonableness issue. Thus, we must now decide whether to continue to include geographic and product competition as evidentiary tools in market dominance proceedings. We find that we should. Geographic and product competition serve as effective constraints on the abuse of market power by a rail carrier. Therefore, they are relevant factors to be considered in determining whether a carrier is market dominant vis-a-vis certain traffic. Not to consider such factors may, in many instances, result in inaccurate determinations of market dominance.

Most of the participants in this proceeding objected to the inclusion of geographic and product competition as evidence. Their comments were almost entirely based on the Commission's own reasons for not considering geographic and product competition in the original rules developed in Ex Parte No. 320; *Special Proc. for Findings of Market Dominance*, 353 I.C.C. 874 (1976). While the Commission indicated in 359 I.C.C. 736, footnote 7 (1979) its intention to include geographic and product competition as evidence in a market dominance determination, it never explained this in reference to its 1976 position. Because we would like to make this decision as complete as possible, we think it appropriate to examine the reasons for our earlier position on this issue.

In Ex Parte No. 320, the Commission dismissed geographic and product competition for use in calculating the market share presumption or its rebuttal. Geographic competition is a restraint

on rail pricing stemming from a shipper's or receiver's ability to get the product to which the rate applies from another source, or ship it to another destination. Because the shippers and receivers can do this, the railroad must compete with the railroad serving the alternate source or destination. Product competition occurs when a receiver or shipper can use a substitute(s) for the product covered by the rail rate. In that case, the railroad must compete with the railroad or other mode who carries that other product, and again, must keep its rate competitive if it wants the traffic.

In its original market dominance proceeding, the Commission found first that the law itself excludes consideration of geographic or product competition. To support this view the Commission cited section 202(c)(i) of the 4R Act:

market dominance refers to an absence of effective competition, from other carriers or modes of transportation, for the traffic or movement to which a rate applies.

The Commission's interpretation of this passage was that the only sources of competition to be considered in market dominance proceedings are other carriers transporting the same commodity between the origin and destination to which the challenged rate applies.

We believe that this interpretation was unnecessarily restrictive. There is no evidence in the 4R Act that Congress, intended that we consider only "direct" competition from other carriers or modes. Since "the traffic to which the rate applies" faces competition from other sources or destinations of the same product or from substitute products, the carriers transporting that traffic face "indirect" competition from other carriers. To demonstrate this point, consider the following example. Assume that a shipper at point A can buy a desired product from two alternative sources, B and C. These sources are served by different carriers. Carrier X transports the product from B to A and carrier Y transports the product from C to A. How much the shipper will buy from each source depends, in part, on the

cost of transportation from each source. Now assume that carrier Y raises the rate it charges the shipper. Since source C is now relatively less attractive to the shipper than source B, carrier Y will lose traffic and carrier X will gain traffic as a consequence of Y's action. The fact that carrier X indirectly competes for carrier Y's traffic, and vice versa, serves as a constraint on the ability of either carrier to raise rates. "[E]ffective competition from other carriers or modes of transportation, for the traffic to which a rate applies" means that, if a carrier raises the rate for such traffic, then some or all of that traffic will be lost to other carriers or modes. We strongly believe that the example of geographic competition given above is appropriately encompassed by Congress' language.

Congress did not explicitly include or exclude geographic and product competition from its definition of market dominance. The definition, as contained in section 202(c)(i) of the 4R Act, was left unchanged by the Staggers Act. This definition, however, has a range of possible interpretations which Congress left to the Commission to fix exactly. Although the Commission's earlier interpretation of the definition of market dominance was restrictive, we believe that Congress, in the Staggers Act, intended a much more flexible interpretation. We base this view, in part, on language in the Conference Committee Report on section 201:

In maintaining the term market dominance, in addition to statutory changes designed to provide more rate freedom to rail carriers, the Conferees intended that whenever there is effective competition which will restrain rate increases by the railroads, such competition should continue to function as the regulator of the rate rather than the Commission.

Effective competition for a firm providing a good or service means that there must be pressures on that firm to perform up to standards and at reasonable prices, or lose desirable business. Depending on the nature of the good or service, sources of competitive pressure may be of several different forms. For example, effective competition for "the traffic or movement to which a rate applies" can arise from: (1) carriers or modes of transport-

tation serving the same origin/destination pair as that for the disputed rate, (2) carriers or modes of transportation delivering the same product from the same origin to alternative destinations, (3) carriers or modes of transportation delivering the same product to the same destination from alternative origins, and (4) carriers or modes of transportation delivering substitute products to the same destination, irrespective of origin.

We do not contend that all these sources of competition are equally effective in every circumstance. The effectiveness of each depends on the specific circumstances involved and this cannot be determined until each case is investigated. We believe that to exclude from consideration *a priori* any potential source of competition would be contrary to the intent of Congress as expressed in the Staggers Act, and would be bound to lead to inaccurate findings of market dominance.

A related contention of many of the participants in this proceeding is that subsection 205 3(B) of the Staggers Act precludes the Commission from considering geographic and product competition in market dominance determinations. As indicated above, section 205 concerns the use of product (and geographic) competition to determine the reasonableness of rail rates. Subsection 205 3(B) reads as follows:

Nothing in this subsection shall be construed as altering the meaning, use, or interpretation by the Commission, the courts or any party of the term 'market dominance,' as defined in section 10709(a) of title 49, United States Code. The enactment of this subsection shall not be considered by the Commission in any proceeding or by any court on an appeal from that or any other proceeding, to determine the proper scope of the term 'market dominance' over the transportation to which any particular rate applies.

This statement precludes the Commission from construing any part of section 205 of the Staggers Act as a directive for altering its interpretation of the definition of market dominance. It in no way precludes the Commission, on its own initiative, from altering its interpretation. The legislative history on section 205 makes this quite clear.

A second argument offered in the original market dominance proceeding was that it is not possible to make accurate findings of the absence or presence of product or geographic competition in the time allotted. We no longer believe that it is appropriate to assume, prior to any investigation, that this problem would exist in every case. With appropriate guidelines for submitting evidence, determining the presence of effective geographic or product competition should be manageable in most cases. The guidelines provided below indicate what types of evidence the Commission believes that it needs to ascertain, within the time limits, the presence or absence of effective geographic or product competition.

In general, geographic or product competition will be deemed to be present if it is established that alternative supplies of the same or a close substitute product exist and that carriers transporting these same or close substitute commodities from the various sources to the various destinations compete with one another for the traffic in question. Whether such competition is judged to be effective will depend on evidence concerning the substitutability of one supply source or destination for another or one product for another. If, in a particular case, the Commission finds that the evidence submitted is inconclusive, then such evidence will be given minimal weight in our determination of market dominance. We believe that this is an improvement over our 1976 position that evidence of geographic and product competition be always and automatically excluded from every proceeding.

The third reason put forward by the Commission for excluding evidence of product or geographic competition was that only immediate loss of traffic would constitute evidence of truly effective competition, and that geographic or product competition would not provide such immediate constraints. Geographic and product competition can do limit rates to reasonable levels despite the inability of shippers to switch to alternative sources or products immediately. Though less effective than an

immediate loss of traffic, a future loss of traffic is nonetheless harmful to a rail carrier. If the loss in future revenues exceeds the gains from exercising market power in the short term, then a rail carrier will be deterred from charging excessive rates.

In sum, we believe that geographic and product competition are encompassed by the definition of market dominance as presented in section 202 of the 4R Act. Further, a more flexible interpretation of this definition is consistent with the intent of Congress as expressed in relevant sections of the Staggers Act. Finally, problems associated with evaluating evidence pertaining to geographic and product competition should be mitigated by the guidelines established for submitting such evidence.

Guidelines for Submitting Evidence

In this section, we establish guidelines to assist shippers and carriers in compiling evidence pertaining to the presence or absence of effective competition for the traffic to which a challenged rate applies. We emphasize that it need not be demonstrated that transportation alternatives, other than the one in question, have actually been used in the past. Since there is a tendency to use the best alternative for a particular time and place and under given circumstances, such information is of little use for purposes of gauging the presence or absence of competitive pressures. In general, evidence should reflect the number of available alternatives and the feasibility of using each. The guidelines address the four major forms of competition that affect rail transportation: (1) intramodal competition; (2) intermodal competition; (3) geographic competition; and (4) product competition. Other forms of competition may also be of importance depending on individual circumstances. Since we cannot anticipate every possible form of competition, we must forego general guidelines for evidence pertaining to forms of competition that are more case-specific. However, we are nonetheless open to such evidence and will give it due consideration.

Prior to setting out the substantive guidelines, it is appropriate to review the respective obligations of carriers and protestants/complainants in submitting the relevant evidence. The carrier has two new obligations. First, if it wishes to avoid jurisdiction based on the applicable revenue/variable cost ratio, it has the burden of proof and therefore, of coming forward with convincing evidence. The protestant/complainant may respond to this evidence and the carrier may reply. If the carrier fails to raise this issue, we will proceed to an analysis of the qualitative factors. Second, if the railroad seeks a finding of no market dominance based on product or geographic competition it must identify where it believes such competition exists. Once the railroad has made this identification, the shipper has the burden of proving that the product or geographic competition identified by the railroad is not effective. Obviously, if these allegations are made in the context of a proposed rate, the quality of the evidence will be less than in a complaint proceeding in which more time is available. However, motions to dismiss an investigation and suspension or investigation proceeding based on newly developed evidence may be filed.

Aside from the new obligation to respond to (rebut) railroad claims in these two areas, protestants/complainants basically have the same burdens as before — that is, the burden of proving a lack of effective competition. Sections (1)-(4) below indicate the type of evidence we consider important. Protestants/complainants should also use these guidelines for preparation of rebuttal evidence.

1. *Intramodal competition.* — Intramodal competition refers to competition between two or more railroads transporting the same commodity between the same origin and destination. A shipper has rail alternatives when, for a given purpose, it can be served by more than one railroad or combination of different railroads. The degree to which these alternatives compete with one another depends on such factors as:

(1) the number of rail alternatives;

(2) the feasibility of each alternative as evidenced by:

(a) physical characteristics of the route associated with each alternative that are indicative of the feasibility of using that alternative for the traffic in question (e.g., circuitry, track conditions, et cetera); and

(b) the direct access of both the shipper and the receiver to each of the rail alternatives as evidenced by individual rail sidings, neutral terminal companies or reciprocal switching; or, if direct access is not available, then the feasibility of using local trucking to transport the commodity to or from terminals;

(3) the transportation costs associated with each alternative (to determine if actual use or alternatives is due to excessive rates charged by the rail carrier in question);

(4) collective ratemaking among the railroads in question as evidenced by rate bureau involvement; and

(5) evidence of substantial rail-related investment or long-term supply contracts (more weight will be given these contracts if made prior to October 1, 1980).

These factors should be considered in connection with the preparation and submission of evidence pertaining to the presence or absence of effective intramodal competition. This list is neither exhaustive nor mandatory but provides a general indication of the type of evidence that would be appropriate.

2. *Intermodal competition.* — Intermodal competition refers to competition between rail carriers and other modes for the transportation of a particular product between the same origin and destination. Motor and water carriage are the main sources of intermodal competition for railroads.

a. *Water carriage.* — Water carriage is restricted to certain geographic areas and is generally used for commodities moving in bulk. The evidence required to demonstrate effective competition between rail and water alternatives is in many respects similar to that required for intramodal competition among rail carriers. Parties in a rate case should provide evidence along the following lines:

(1) the number of alternatives involving different carriers;

(2) the feasibility of each alternative as evidenced by:

- (a) pertinent physical characteristics, for the product in question, of the transportation or routing associated with each alternative;
- (b) the access of both the shipper and receiver to each alternative; and
- (4) the transportation costs of each alternative.

Again, these factors are not exhaustive.

b. *Motor carriage.* — Unlike rail or water alternatives, the availability of many motor carrier alternatives for transportation services between two points can, in most instances, be taken for granted. Therefore, the feasibility of using motor carriage as an alternative to rail may be viewed as depending exclusively on the nature of the product and the needs for the shipper or receiver. Effective competition from motor carriage may be deduced from the following types of evidence:

- (1) the amount of the product in question that is transported by motor carrier where rail alternatives are available;
- (2) the amount of the product that is transported by motor carrier under transportation circumstances (e.g., shipment size and distance) similar to rail;
- (3) the amount of the product that is transported using motor carrier by shippers with similar needs (distributional, inventory, et cetera) as the shipper protesting the rate;
- (4) physical characteristics of the product in question that may preclude transportation by motor carrier; and
- (5) the transportation costs of the rail and motor carrier alternatives.

Other types of evidence on the feasibility or nonfeasibility of motor carriage as an alternative to rail will also be considered.

3. *Geographic competition.* — Geographic competition was described and defined above. Geographic competition among rail carriers is nontrivial for commodities in which transportation costs account for a substantial portion of the delivered price. To establish the potential for geographic competition, evidence should be submitted concerning the following:

- (1) the number of alternative geographical sources of supply or alternative destinations available to the shipper or receiver for the product in question;
- (2) the number of these alternative sources or destinations served by different carriers; and

(3) that the product available from each source or required by each destination is the same.

Such evidence is sufficient only to indicate whether effective geographic competition is possible. To determine whether effective geographic competition actually exists, evidence showing the feasibility of each source or destination and the likelihood of competition should be presented. This evidence may be as follows:

- (4) the distance associated with each alternative source or destination;
- (5) relevant physical characteristics of the route associated with each alternative;
- (6) the access of the shipper or receiver to each transportation alternative;
- (7) the capacity of each source to supply the product in question or the capacity of each destination to absorb the product in question;
- (8) the transportation costs associated with each alternative;
- (9) collective ratemaking among the railroads in question as evidenced by rate bureaus; and
- (10) evidence of substantial rail-related investment or long-term supply contracts (more weight will be given these contracts if made prior to October 1, 1980).

We again emphasize that these guidelines are not intended to encompass all pertinent evidence.

4. *Product competition.* — Product competition was also described and defined earlier. Evidence as to its existence should reflect the availability to the shipper or receiver of feasible substitutes and show that these substitutes can be obtained through the use of other carriers or modes without substantially greater cost, transportation or otherwise. To demonstrate whether a feasible substitute exists, the following types of evidence, among others, may be submitted:

- (1) use of a substitute product(s) by the receiver or shipper in question or by others with similar needs and under similar conditions;
- (2) the prices of the substitute product(s) relative to the product in question;
- (3) the efficiency of the substitute product(s) relative to the product in question; and

(4) the explicit and implicit transportation costs of the substitute product(s) and the product in question.

Again, these factors are not exhaustive.

These lists of factors concerning submission of evidence replace rebuttable presumptions in market dominance proceedings. We anticipate more accurate market dominance determinations because of the greater flexibility afforded by this approach. The substitution of these guidelines for presumptions should not significantly increase the burden of these proceedings on shippers, carriers or the Commission.

Conclusions

We have established guidelines for the submission of evidence in market dominance proceedings. Evidence of product and geographic competition will be considered in these deliberations. At the same time, by separate notice, we have eliminated the rebuttable presumptions and related procedures for making findings of market dominance as promulgated in Ex Parte No. 320, *Special Proc. for Findings of Market Dominance*, 353 I.C.C. 874 (1976) and 353 I.C.C. 12 (1976) [sic].

This decision will not significantly affect either the quality of the human environment, the conservation of energy resources, or small business.

Authority: 49 U.S.C. 10709, 10321, section 205, Public Law 96-448, 5 U.S.C. 553.

By the Commission, Acting Chairman Alexis, Commissioners Gresham, Clapp, Trantum, and Gilliam.

AGATHA L. MERGENOVICH.
Secretary

(Seal)

APPENDIX E

INTERSTATE COMMERCE COMMISSION

DECISION

EX PARTE No. 320

RAIL MARKET DOMINANCE

EX PARTE No. 320 (Sub-No. 2)

**MARKET DOMINANCE DETERMINATIONS AND
CONSIDERATION OF PRODUCT COMPETITION**

Decided: August 4, 1981

In Ex Parte No. 320, *Rail Market Dominance*, 365 I.C.C. 116 and Ex Parte No. 320 (Sub-No. 2), *Market Dominance Determinations*, 365 I.C.C. 118, to be effective August 7, 1981,¹ we determined that the market dominance regulations and presumptions found at 49 CFR 1109.1 would be discontinued and replaced with evidentiary guidelines. Evidence of geographic and product competition was found relevant to a determination of market dominance. The National Industrial Traffic League, the Chlorine Institute, Inc., Carolina Power & Light Company² and the American Paper Institute, Inc. have filed petitions requesting that the Commission stay the effective date of the decisions pending administrative review. The Western Coal Traffic

¹The decisions were served on July 8, 1981. Due to inadvertence both documents were published in the Federal Register before service to the parties. The effective date of the notice of decision and the removal of existing rules, therefore, has been extended to thirty days from the date of service, rather than the date of publication in the Federal Register. See. FR p. 36145, Tuesday, July 14, 1981.

²This petition also embraces Duke Power Company, South Carolina Electric & Gas Company and Virginia Electric and Power Company.

League,³ Central Illinois Light Company,⁴ Consumer Owned Power Interests, the Committee on Transportation and Distribution of the Society of the Plastics Industry, Inc., Kerr-McGee Corporation,⁵ the Chemical Manufacturers Association,⁶ and the National Coal Association⁷ have filed petitions requesting that the Commission stay the effective date of the decisions pending judicial review. The Railroads have replied to the petitions for administrative stay.

In determining whether to stay our decision, the relevant criteria are (1) whether petitioner has a substantial likelihood of prevailing on the merits; (2) whether the petitioner will be irreparably injured absent a stay; (3) whether a stay will harm other parties interested in the proceeding; and (4) whether a stay will interfere with the public interest; *Washington Metropolitan*

³*Western Coal Traffic League v. United States of America, et al.*, Nos. 81-4257 and 81-4259 (5th Circuit).

⁴This petition also embraces the Middle South Utilities System, Potomac Electric Power Company, Public Service Company of Indiana, Inc., and South Carolina Public Service Authority. Petitioners have filed a petition for judicial review in the United States Court of Appeals for the Fifth Circuit. *Arkansas-Missouri Power Company, et al. v. United States of America and Interstate Commerce Commission*, No. 81-4277 (5th Circuit).

⁵This petition also embraces Gulf States Utilities Company, Iowa Power & Light Company, Oklahoma Gas & Electric Company, and Southwestern Electric Power Company.

⁶The Chemical Manufacturers Association moved, on July 20, 1981, to intervene in the Fifth Circuit appeal filed by petitioner Western Coal Traffic League, note 3, *supra*.

⁷The National Coal Association moved, on July 13, 1981, to intervene in the Fifth Circuit appeal filed by petitioner Western Coal Traffic League, note 3, *supra*.

Petitions for stay pending judicial review, filed by the Chlorine Institute, Inc., on July 30, 1981 and the Edison Electric Institute on July 31, 1981 have been rejected as late filed pursuant to 49 CFR 1100.98(e) which states that such petitions shall be filed not less than 10 days prior to the date the terms of the action take effect.

Area Transit Comm. v. Holiday Tours, 559 F.2d 841, 842-43 (D.C. Cir. 1977), *Canal Authority of State of Florida v. Calloway*, 489 F.2d 567, 572-73 (5th Cir. 1974); *Virginia Petroleum Jobbers Ass'n. v. Federal Power Comm'n.*, 259 F.2d 921, 925 (D.C. Cir. 1958).

Likelihood of Success on the Merits

Petitioners challenge the lawfulness of the Commission's July 8 decisions and the rescinding of the market dominance regulations on various grounds. Although the ultimate validity of our decisions will not be determined here, we believe that petitioners have not demonstrated a likelihood of success on the merits.

First, it is contended that the evidentiary guidelines will vastly increase the burden on both carriers and shippers in the determination of market dominance, without increasing the accuracy of market dominance determinations. The Commission's approach is characterized as a "scattershot" listing of factors" which will encourage speculation and surmise regarding market dominance. This approach, it is argued, is inconsistent with the requirement of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act) that market dominance rules provide for a "practical determination without administrative delay," and that market dominance be a determination of the existence of effective competition.

We do not believe that our evidentiary guidelines will increase the burden on carriers and shippers. We do believe that our guidelines will increase the reliability of market dominance determinations. As we stated in Ex Parte No. 320 (Sub-No. 2), time has not shown that the use of rebuttable presumptions has enhanced the accuracy of market dominance determinations. To ensure accuracy, we need to add to those quantitative factors used to gauge competition other qualitative factors more indicative of the degree of market power possessed by a rail carrier over certain traffic. Contrary to petitioners' assertions, our guidelines do not encourage speculation and surmise. Indeed,

they provide far more detailed guidance than the former presumptions and thus represent an opportunity for parties to submit any and all relevant evidence necessary for us to ascertain accurately the existence of market dominance. Moreover, by replacing the regulations with evidentiary guidelines we do not believe that administrative delay will occur. Instead, with appropriate guidelines identifying what would constitute relevant evidence of market dominance, more accurate determinations can be made within the 90-day time period within which certain of these determinations must be made.

Petitioners also argue that pursuant to Section 202 of the 4R Act the Commission is clearly required to establish "rules" in accordance with the Administrative Procedure Act. The promulgation of incomplete "guidelines," petitioners suggest, does not conform with this statutory requirement. We disagree. As we pointed out in our decision (see discussion, 365 I.C.C. at 129-30), we believe that Congress, in the Staggers Act, intended a much more flexible interpretation of market dominance than we have previously accorded. Consequently, we believe our evidentiary guidelines will facilitate this Congressional intent. More importantly, our decision to rescind the presumptions and promulgate new guidelines was also based on our reexamination of the original 4R Act language and rationale in light of our experience with the presumptions (see discussion, 365 I.C.C. at 128-29). While the 4R Act required us to establish rules, which we did, it did not prohibit us from rescinding them. For these reasons, we reject this argument.

Petitioners next contend that consideration of product and geographic competition is not permitted by 49 U.S.C. §10709(a) which defines market dominance as "the absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies." In addition, it is suggested that consideration of product competition, to the extent contemplated by the July 8 decision, will involve the Commission in questions far beyond its area of expertise.

Our decisions of July 8 rejected the narrow interpretation petitioners give §10709(a). We explained that geographic and product competition serve as effective constraints on the abuse of market power by a rail carrier. Consequently, they are pertinent factors to be considered in gauging whether a carrier exercises market dominance over certain traffic. To ignore these factors would, in many instances, result in inaccurate determinations of market dominance. We also explained that our previous interpretation of §10709(a) was merely one within a range of possible interpretations which Congress left to the Commission to fix exactly. Geographic and product competition were neither excluded nor included by Congress from its definition of market dominance. For reasons which will not be repeated here, we found that our adoption of a more complete analysis was crucial to our proper exercise of jurisdiction under the Act, as amended. Product and geographic competition affect the competitive environment in which the rail carrier establishes its rates.

With respect to the contention that considerations of product competition will involve the Commission in questions exceeding its expertise, which is unwarranted under the statutory scheme, we believe that Congress has indicated the opposite to be true. Section 205(a)(1) of the Staggers Act directed the Commission to commence a proceeding for the purposes of determining whether, and to what extent, product competition should be considered in proceedings to determine the reasonableness of rail carrier rates. In that instance rather than prohibit the Commission, because of lack of expertise, from determining the consideration to be accorded product competition, Congress specifically provided that such a determination be made by the Commission. As contemplated by the instant decisions, Commission consideration of product competition does not differ substantially from that which would be exercised if we had decided to do so in a reasonableness context. We cannot agree, therefore, that our consideration of product competition, as contemplated by our July 8 decisions, will allow us to tread in

areas other than those in which Congress has previously evidenced its approval of our involvement.

It is argued that our non-retention of the market share presumption is arbitrary and capricious. Rather than eliminate the presumption, it is suggested that problems encountered in defining the scope of the market could be ameliorated through more precise definition of how the market share is to be calculated. We disagree. As we explained in the July 8 decision, there are substantial problems associated with both the accurate calculation of a market share percentage and the import of such a percentage in relation to market dominance. These difficulties make impractical the use of market share information in the form of a rebuttable presumption. Accurate calculation of a market share percentage necessitates ascertaining the appropriate scope of the market. The factors that determine the appropriate scope of a market vary widely from one case to another. This problem, we found, bars any uniform formula for market share determination which is both practicable and serviceable. Similarly, we found the presumption inadequate because the competitive implications of any given market share percentage, even if accurately calculated, vary widely from case to case. Considering these factors, we believe our new guidelines provide a far more useful and reliable method for determining the railroads' market power in a given situation.

Petitioners contend that the Commission was incorrect, arbitrary, and capricious in eliminating the substantial investment presumption. In addition, petitioners question the Commission's determination that investments made after October 1, 1980 are irrelevant in ascertaining whether a shipper is tied to the use of rail. As we indicated in our July 8 decision, this presumption was designed to protect shippers who make themselves captive to a particular carrier as a consequence of making substantial rail-related investment. We proposed its elimination because of difficulties encountered in identification of pertinent elements of a shipper's investment and because of the effect of a

more liberal Commission contract policy (and subsequent codification thereof in the Staggers Act) on shipper-carrier contracts. Petitioners object to the significance accorded shipper-carrier contracts by our decisions. They aver that since contracts are merely an alternative for shippers, the Commission placed undue emphasis on their importance. For reasons specified in our decision, we did base our decision, in part, upon considerations of newly found contractual freedoms for carriers and shippers. We did, however, also premise our decision upon considerations of pertinent investment identification. While petitioners attempt to show why they would prevail because of our contractual reasoning, they fail whatsoever to address this other basis of our reasoning. For this reason alone we do not believe petitioners would prevail on this argument.

Petitioners final argument addresses the Commission's determination that gives "considerably less weight" to long-term supply contracts signed after October 1, 1980. Petitioners maintain that, in effect, the Commission's action requires shippers entering into long-term supply contracts to sign transportation contracts with rail carriers for similar lengths of time. Such a posture, it is asserted, ignores the plethora of factors that might affect the duration of a transportation contract. We explained in the July 8 decision that we were placing less weight on evidence of long-term supply contracts for reasons similar to those supporting our substantial investment presumption revisions. In this instance, particularly, we are convinced that shippers are not deprived of the Interstate Commerce Act's protections. We have only lessened the significance of long-term supply contracts entered into subsequent to the effective date of the Staggers Act to make clear that shippers cannot rely on such post-Staggers Act contracts alone to establish market dominance. In such situations, as we pointed out (365 I.C.C. at 126), shippers who would be captive irrespective of long-term supply contracts should be able to establish market dominance on the basis of other evidence.

Irreparable Injury to Petitioner Versus Harm to Other Parties

In support of its allegation of irreparable injury about a stay pending administrative review, petitioners essentially argue that because of the replacement of market dominance presumptions with evidentiary guidelines, and with the inclusion of evidence of geographic and product competition, shippers will be subject to unreasonably high, and therefore unlawful, rail rates. In addition, petitioners fear that all remedies available to them under the Interstate Commerce Act will be foreclosed.

Before the Commission may adjudicate the reasonableness of a rail rate, it must find that a carrier has market dominance. A Commission finding that a carrier does not have market dominance is determinative unless that finding is changed or set aside by a court of competent jurisdiction. Further, if the Commission has previously found that a carrier does not have market dominance over the transportation to which a proposed rate increase applies, the Commission may suspend the increase only if it specifically changes or sets aside its prior determination of market dominance. Consequently, when the Commission makes a finding, in accordance with its market dominance guidelines, that market dominance does not exist, a proceeding with respect to rate reasonableness is terminated. There remains for such a shipper no means under the Interstate Commerce Act to challenge the reasonableness of the rate. In essence, petitioners believe that to the extent our decisions render it more difficult for shippers to make a showing of a carrier's market dominance over the movement of certain traffic, shippers will be irreparably injured since they are precluded from pursuing remedies under the Interstate Commerce Act.

This argument must fail if only because petitioners have not shown that they will not be able to prove market dominance under the new guidelines. In any event, unless we find that a carrier exercises market dominance we have no jurisdiction to make a determination that a rate exceeds a reasonable max-

imum. Further, to the extent that petitioners prevail on administrative or judicial review, and to the extent a shipper is compelled to pay an unreasonable rate due to our market dominance evidentiary guidelines, reparations will be available to make it whole.

Petitioners assert that neither the railroads nor any other party will be hampered by the grant of the stay. At the most, petitioners contend, railroads will only be required to prove that the rates they charge are reasonable. For proceedings instituted after October 1, 1980, adjudication of rate reasonableness would only involve rates which produce a revenue to variable cost ratio of 160 percent or more. To the extent railroads are injured by having to adjudicate rates under the present market dominance rules, the injury is much less than the injuries which shippers would suffer under the new evidentiary guidelines.

We disagree. As noted above, the injury which might occur to petitioners is speculative and subject to redress. It is no different than any injury that may have occurred under our market dominance presumptions. On the other hand, the current market dominance rules inaccurately measure the extent of a rail carriers market dominance. To the extent that we perpetuate these rules, carriers will be forced to adjudicate the reasonableness of rates not intended by Congress to be the subject of challenge. Moreover, perpetuation of these rules would conflict with the carrying out of the transportation policy of 49 U.S.C. 10101a(1).

Public Interest

Public interest considerations weigh heavily in favor of expeditious implementation of the July 8, 1981 decisions. Through these decisions, the Commission has endeavored to ascertain more precisely the existence or non-existence of market dominance in any given case. Only through an accurate determination of whether market dominance exists will the Commission be able to know whether exercise of its reason-

ableness jurisdiction is necessary to protect the public from abuses of monopoly power.

It is ordered:

The petitions for stay of our July 8, 1981 decisions are denied.

By the Commission, Reese H. Taylor, Jr., Chairman.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

APPENDIX F**INTERSTATE COMMERCE COMMISSION****DECISION****EX PARTE No. 320****RAIL MARKET DOMINANCE****EX PARTE No. 320 (Sub-No. 2)****MARKET DOMINANCE DETERMINATIONS AND
CONSIDERATION OF PRODUCT COMPETITION****Decided: October 1, 1981**

Petitions have been filed¹ requesting that we reconsider these decisions served July 8, 1981.² In these decisions the market dominance presumptions were eliminated in favor of evidentiary guidelines. We also sanctioned the use of product (including geographic) competition as relevant evidence. The railroads have replied.

The petitions may be granted only upon a showing of material error, new evidence, or changed circumstances. We are unable to identify any material error, new evidence, or changed circumstances which warrant reopening the prior decisions.

This decision will not significantly affect either the quality of the human environment or conservation of energy resources.

¹Petitions by the Houston Port Bureau, Inc., Secretary of Agriculture of the United States, American Paper Institute, Inc., The National Industrial Traffic League, The Chlorine Institute, Inc., The Aluminum Association, Inc., The Fertilizer Institute, Carolina Power & Light *et al.*, Central Illinois Light Company *et al.*, Kerr-McGee Corporation *et al.*, and North Dakota State Wheat Commission *et al.*

²The Ex Parte 320 (Sub-No. 2) decision here referred to is the second of two issued in that proceeding. The first, which relates to the role of product competition in the analysis of a challenged rail rate, was served on May 18, 1981.

It is ordered:

The petitions are denied.

By the Commission, Chairman Taylor, Vice Chairman Clapp, Commissioners Gresham and Gilliam. Chairman Taylor concurred with a separate expression.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

CHAIRMAN TAYLOR, concurring:

Contrary to petitioners' assertions, I am not convinced that a shift from rebuttable presumptions to evidentiary criteria will necessarily compromise the ability of shippers to demonstrate market dominance on a case-by-case basis. However, I must question whether the new evidentiary criteria is consistent with our original Congressional mandate that we establish "standards and procedures" that, with regard to market dominance, will permit "a practical determination without administrative delay." Certainly, if our former presumptions could be characterized as crude and not always accurate, our present criteria could be characterized as something less than totally objective and unambiguous.

I must also profess reservations as to the practical application of geographic and product competition in market dominance determinations. For instance, I can envision a situation where a shipper interested in expanding into a new market is dependent upon a single carrier, except that the carrier's rate levels prevent the shipper from competitively entering the new market. By giving expression to geographic and product competition, would we deny the shipper the opportunity to contest the rate level and perhaps the opportunity to reach the new market simply because (1) there are still other markets available to the shipper,

(2) other sources of supply are available to the consignee, or (3) interchangeable products or commodities are available to the consignee in sufficient quantities at competitive costs. Notwithstanding the issue of whether the statutory definition of market dominance was intended to embrace geographic and product competition, I am willing to resolve my reservations by reviewing allegations of geographic and product competition on a case-by-case basis.

APPENDIX G

**UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Nos. 81-4257, 81-4259, 81-4277, 81-4299, 81-4334,
81-4347, 81-4354, 81-4357, 81-4365 to 81-4369,
81-4373, 81-4415, 81-4423 and 82-4021

**WESTERN COAL TRAFFIC LEAGUE
and Its Members, ET AL.,**
Petitioners,
versus

**UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,**
Respondents.

**Petitions for Review of an Order of the
Interstate Commerce Commission**

Before CLARK, Chief Judge, BROWN, RUBIN, REAVLEY,
POLITZ, TATE, JOHNSON, WILLIAMS, JOLLY
and HIGGINBOTHAM, Circuit Judges.*

JUDGMENT

JUDGMENT ON REHEARING EN BANC

This cause came on to be heard on rehearing en banc with
oral argument;

*Judges Thomas Gibbs Gee, Carolyn Dineen Randall and Will Garwood, recused themselves and did not participate in the decision.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by the Court that part III, sections 1, 2, 3 and 4 of the opinion entered by a panel of this Court on December 8, 1982 is adopted as the opinion of the Court en banc; the decision of the Interstate Commerce Commission is affirmed by the Court en banc.

IT IS FURTHER ORDERED that petitioners and petitioners-intervenors pay to respondents the costs on appeal, to be taxed by the Clerk of this Court.

NOVEMBER 14, 1983

RUBIN, Circuit Judge, with whom REAVLEY, Circuit Judge, joins, dissenting.

ISSUED AS MANDATE: DEC 8 1983

APPENDIX H

Ex Parte No. 320[*]

SPECIAL PROCEDURES FOR MAKING FINDINGS OF MARKET DOMINANCE AS REQUIRED BY THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976

Decided August 20, 1976

Upon investigation, standards and procedures to be used in market dominance determinations adopted as part 1109.1 of Title 49 of the Code of Federal Regulations, subject to further comment of the parties. [353 I.C.C. 875]

* * *

Interim Report of the Commission

By the Commission:

The institution of this rulemaking proceeding was mandated by Congress in section 202 of the "Railroad Revitalization and Regulatory Reform Act of 1976."¹ Therein the Commission is directed to establish rules and procedures for determining whether and when a carrier possesses market dominance over a service rendered or to be rendered at a particular rate or rates. Pursuant to this directive, on March 10, 1976, the Commission issued a Notice of Proposed Rulemaking and Order² in which it

Relevant excerpts from this decision, which is reported in full at 353 I.C.C. 874 (1976), are set forth herein. Deletions in the text are designated by asterisks [" * *"]. Each deletion is preceded by a bracketed insert identifying the pages of the printed decision that are excerpted, e.g., [353 I.C.C. 876-878] means that the preceding section appears on those pages in the official report.

¹Public Law 94-210, hereinafter the 4R Act. Portions of section 202 which relate to market dominance are set forth in Appendix E.

²A copy of the Notice of Proposed Rulemaking and Order is attached as appendix A.

set out proposed amendments to Title 49 of the Code of Federal Regulations.

The amendments³ contained proposed procedures and requirements to be used in making determinations relating to market dominance. Evidentiary and procedural requirements were set out, as well as a number of factual situations, the showing of any one of which would establish a rebuttable presumption of market dominance on the part of the carrier or carriers involved. All interested parties were invited to participate in the proceeding, and in accordance with congressional intent, the recommendations of the Attorney General and of the Federal Trade Commission were solicited.

General Introduction

The Commission's approach as set out in the Notice of Proposed Rulemaking and Order was designed to provide standards and procedures for determining, without administrative delay, whether and when a carrier possesses market dominance over a service. Therein we noted that the legislative history of section 202 of the 4R Act indicates that the Commission is not to be strictly bound by antitrust concepts and precedents. We pointed out that pursuant to the Interstate Commerce Act (the act), as amended by the 4R Act, the Commission must make a market dominance determination within 90 days of the institution of a proceeding in which a rate is challenged as being unreasonably high, and, where suspension of an increased rate is at issue, the determination may be required within 30 days of the rate filing.

As we observed in the Notice, and as contemplated by Congress, the statutory time constraints require that evidence be gathered promptly and measured against reasonable substantive standards. With these time constraints in mind, we proposed the use of rebuttable presumptions which would operate in spe-

³The original designation of the amendments as 49 CFR 1108, was changed to 49 CFR 1109 in 49 F.R. 12231, March 24, 1976.

cified circumstances. The seven factual patterns proposed were designed to create rebuttable presumptions of market dominance in situations where experience has shown that the railroads typically possess such dominance. In any proceeding involving a market dominance determination, establishment of the existence of one or more of the proposed fact patterns would create a rebuttable presumption that the carrier whose rates are in issue has market dominance over the involved traffic or movement. The seven factual situations were proposed as follows:

(1) Where the rate in issue has been discussed or considered in proceedings before a rail carrier rate bureau acting under an agreement filed with and approved by the Commission pursuant to section 5b, or the former section 5a, of the Interstate Commerce Act;

(2) Where no other carrier of any mode has handled a significant amount of the involved traffic for at least 1 year preceding the filing of the proposed rates;

(3) Where other carriers of any mode have handled a significant amount of traffic but there is no evidence of actual price competition in the past 3 years;

(4) Where the rate in issue exceeds the rate(s) charged by other carriers offering the same or interchangeable service between points involved by 25 percent or more;

(5) Where the rate in issue exceeds the fully allocated cost of providing the service by 50 percent or more;

(6) Where the distance between origin and destination exceeds 1,500 miles, except that when the involved movement occurs as a single-line movement, market dominance may be presumed where the distance exceeds 1,200 miles, provided, however, in either instance that when a rate is subject to a minimum weight, such minimum weight shall equal or exceed 20 net tons;

(7) Where the commodity moving under the rate in issue customarily moves in bulk shipments.

As the Commission pointed out in the Notice, the first presumption dealing with rate bureaus was based on congressional instructions contained in the Conference Report which accompanied the 4R Act as finally passed. In the Report, the Committee of Conference stated its intention that there should be presumed to be an absence of competition between railroads with respect to any rate discussed or considered under an agree-

ment approved by the Commission pursuant to the new section 5b of the act. The second presumption, dealing with market share, and the third, dealing with pricing behavior, directly addressed the presence or absence of competition. The fourth presumption, dealing with rate relationships, and the fifth, dealing with the concept of monopoly pricing, focused on the carrier's ability to exact a premium for its service. The sixth and seventh presumptions identified service and commodity characteristics of markets where railroads have traditionally been free of effective competition. In addition to the proposed presumptions, the Notice also sets out evidentiary requirements for carriers and complainants. [353 I.C.C. 876-878]

* * *

d. *Representations: Market definition.* — In general, Justice, DOT, and the railroads advocate a broad market definition including, in addition to carrier competition for the specific movement, competition of substitute products, geographic competition, and potential competition. Briefly stated, product substitution refers to the shipper's or receiver's option to use commodities which are interchangeable for the commodity named in the issue tariff; geographic competition is shipper use of alternative destinations or sources for the products to which the rate applies; and potential competition is the possibility that carriers not presently sharing the market will enter if the rail carrier raises its rates. Justice would consider movements which are competitive under any one of these theories in calculating market share, while the railroads and DOT would consider such evidence only after determining market share based on direct carrier competition.

In sharp contrast, shippers and shipper interests are almost unanimous in their support of a market definition which is confined to carrier competition for the specific movement to which the rate applies.

Justice would define the words "market" and "traffic" in the definition of market dominance in section 202 to include

(1) movements of the same commodity from other sources, and (2) movements of substitute products. It argues that the rate from one source circumscribes the rate a railroad can charge for moving the same commodity to a particular destination from other sources, as the carrier will adjust its rates to allow shippers it serves to compete for the sale of their product. Justice argues that rates may be kept at competitive levels if there are close substitutes for the goods which are being transported, and shippers can receive the substitute by another carrier. Justice also contends that a railroad's statistically high percentage of the market results in some cases from entry limitations imposed by the Commission, and it urges a standard based on a demonstration that other carriers would enter the market but for the lack of certification.

DOT argues that the legislative words "market" and "traffic" require further definition and that the use of these terms must have contemplated competition other than carrier competition between the points to which the rate applies. If the consignee has the alternative of receiving the commodity it needs from another source, thereby using a different carrier, DOT would maintain that effective competition exists within the meaning of the 4R Act. However, DOT does not advocate that "geographic competition" be considered in calculating market share, but suggests that if effective competition is not demonstrated under the market share test, the railroad should then have the opportunity to prove geographic competition.

DOT maintains that rail carrier ratemaking is influenced by the prospect that an increase will cause substitution of one commodity for another or a restriction in the extent to which a commodity can compete geographically. It argues that the Commission should consider a broad range of choices available to shippers and consignees. These shipper alternatives include use of another common carrier of another mode, use of an unregulated carrier, change in inventory and shipment size policy, change in marketing policy, change in products produced, or

change of location. If the shipper has one of these available, then the rail carrier is not in a position to dominate the market. DOT admits that the decision to adopt one of these latter alternatives is generally long run in nature.

DOT also stresses the importance of potential competition as a regulator of carrier behavior, and argues that a key test of market dominance should be whether, given freedom of entry, competition would develop and limit the bargaining strength of an otherwise dominant rail carrier.

The railroads maintain that in making market dominance determinations we must consider "the full range of constraints that the market imposes on a given carrier's power over the rates for specific traffic or a specific movement." While agreeing with Justice that source competition and product substitution are relevant factors to be considered in determining market dominance, they do not support the broad market share test which Justice has proposed: "As a practical matter we have difficulty in seeing how such traffic could be routinely taken into account in ascertaining whether or not the specified percentage had moved by other modes."

The railroads contend that antitrust precedent such as the *Du Pont* case, *supra*, and the House and Senate Reports, would support the determination of effective competition in the context of a product market and a geographic market. They argue that effective competition exists within the meaning of the 4R Act where a buyer of the transported commodity can readily shift to another source of supply. These sources, they maintain, are in the relevant product market for determining whether effective competition exists. Likewise, it is argued that the relevant product market includes substitute products which could be delivered by other carriers or carriers of other modes.

Also in support of their market definition, the railroads argue that the importance of competition from substitute products and alternate geographic sources has been recognized by this Commission in numerous cases. They state that the Commission

has found various mergers to be consistent with the public interest, relying at least in part on these types of competition. The railroads also contend that "The competition of other modes regulated and exempt, for-hire and private has repeatedly been held to justify rates which might otherwise have been found in violation of various provisions of the Interstate Commerce Act." For example, they note, if truck or water carriers are competing for traffic even from an area not directly served by a railroad, but with the effect of disadvantaging the railroad's position and that of its customers, the carrier can lawfully make a competitive marketing response in order to protect its competitive position and that of the shippers. The railroads also maintain that "the reasonable prospect of competition" should be considered, as where an increase [sic] rate would be likely to divert traffic to another carrier or another mode, including private carriage.

USRA would define the market to include shipments of substitute commodities moving to the same destination from sources of comparable or shorter distances. It would include private carriage in the calculation of market share.

Numerous shippers and shipper interests object that the market definition proposed by the railroads and Government agencies is overly broad, and goes beyond the statute. They argue strenuously that the intent of Congress is clear that a finding of the absence of market dominance must be predicated on the existence of carrier competition. NERA objects that the approach advocated by the railroads would require a consideration of "every conceivable factor that in any time frame, however remote, could limit in any way a railroad's ability to raise its rates without risking loss of business." Shippers are concerned that an overly broad market definition will have the practical effect of denying them a forum to redress unreasonable rate increases.

Shippers maintain that proponents of a broad market definition have urged a misreading of *Du Pont supra*, an important

decision delineating "the product market" under the Sherman Act. The shippers argue that *Du Pont* does not support, even by analogy, a consideration of substitute commodities moving in commerce in making market dominance determinations. In *Du Pont* the court found that although defendant produced almost 75 percent of the cellophane sold in the United States, it produced less than 20 percent of all the flexible packaging material. The court said that control of the market depends upon the availability of alternative commodities for buyers. Shippers argue, however, that with regard to market dominance we are dealing with a market for services, and not for commodities, and that we must be concerned with alternative transportation services which can be substituted for the proponent rail service. They maintain that the Commission should consider only the commodity moving under the rate in issue, and not other commodities which may or may not be feasible substitutes from the shipper's viewpoint.

The shippers further maintain that our analysis of competition should be confined to the specific traffic or movement to which the rate applies. They argue that "so called geographic competition" or competition from traffic that could not move under the rate in issue cannot be depended on as an effective regulator of rates, since the rail carrier is under no obligation to adjust its rates to meet competition that shippers face in the distribution of their product. *Du Pont* contends that the proper approach would be to consider commercially feasible alternatives to cover shipment of a particular commodity from a specific shipping point to a specific destination. The Drug and Toilet Preparation Conference and New England Grain and Feed expressed very similar views.

NERA, The Upper Great Plains Traffic Institute, and Phillips Petroleum propose that the Commission consider whether the shipper has a choice of carriers to move its goods. They argue that even if there is a high degree of competition in many segments of the railroad industry, this competition is of no avail

if the shipper has no realistic alternatives in a particular situation.

NERA urges that in assessing the competitive situation of the railroads, we consider the short time period during which the rate in issue will be in effect. It argues that if shipper alternatives require considerable time for their implementation, then they are not likely to be effective regulators of rail rates. NERA also suggests that movements during periods of extraordinary situations such as an act of God, a strike, or a railcar shortage, should not be considered in calculating market share.

e. Conclusions.— An appropriate market definition is necessarily a crucial aspect of any test for market dominance, and particularly a test based upon a share of the market theory. If shippers and carriers are to make timely evidentiary presentations, they should know what evidence is relevant in the calculation of market share, and what evidence will be considered in rebuttal of an inference of market dominance.

The focus of our analysis is section 202 of the 4R Act which defines market dominance as "an absence of effective competition from other carriers or modes of transportation for the traffic or movement to which the rate applies." With only this brief definition as a guideline, this Commission is specifically directed to establish both standards and procedures for making market dominance determinations, and to design rules to provide for "a practical determination without administrative delay." After assessing the statutory language and considering the need for quickly identifying whether effective competition is present, we have concluded that the appropriate market is the market for transportation services which directly compete [sic] with the service outlined in the tariff under consideration. Limiting consideration to direct carrier competition is consistent with the express language of the legislative definition, and is essential to making practical determinations in a short time period.

The contention of some of the parties that use of the word "traffic" in conjunction with the word "movement" requires consideration of a broad range of movements of various commodities moving from various sources to various destinations must be rejected. The 4R Act speaks of "the traffic or movement to which the rate applies." When used in this context in the transportation industry, the word "movement" refers to transportation from a single origin point to a single destination point, while the word "traffic" commonly denotes transportation services from a named set of points to another point or set of points; from specific origin points or areas to rate groups or blanket areas; or between stated mileage brackets on particular commodities in a given territory. There is no language in the legislation which would warrant the extension of the phrase "traffic or movement to which the rate applies" beyond transportation services which are comparable to that described in the issue tariff.

Even if the market definition of the 4R Act were not so explicit, practical considerations would force us to the same conclusion. It is true that the forms of competition which the railroads, Justice, and DOT have discussed, such as product substitution and geographic competition, could have an impact upon the ability of rail carriers to raise their rates. Nevertheless, determining whether these factors have a significant impact in a particular case would require lengthy antitrust-type litigation, as the interplay which affects competition for the sale of a product and competition for transportation services is very complex. If the parties concentrate their efforts on gathering and presenting evidence of direct carrier competition, then the Commission will be able to make these threshold determinations promptly, and the expense to the parties and the public will be minimized.

The difficulty of considering movements from alternate origins or to alternate destinations stems from the fact that transportation is but one of many costs in the process of production; other costs include labor, capital, materials, other

distribution costs, profit, and taxes. The railroads imply that if producers are at a disadvantage in marketing a product in a particular area, rail carriers will automatically reduce their rates to allow the shipper to compete. Although the shipper in this situation will bargain with the carrier and attempt to obtain reduced rates, it may be forced to reduce one of the other costs of production or its profit margin. Whether or not the shipper is in a position to bargain effectively will depend upon a number of factors including the value of the shipper's traffic to the carrier, and the elasticity of demand for the shipper's product.

Cases cited by the railroads and DOT under section 3(1) of the Interstate Commerce Act represent situations where the railroads have responded to competitive pressures and reduced their rates. In these cases, the Commission has held that competition can justify unequal rate treatment which would otherwise be unlawful preference and prejudice. However, the railroad may be able to force the shipper to absorb the differential by reducing its costs or its profit margin, or may be able to produce more revenue by maintaining its higher level of rates on a diminished amount of traffic. Obviously it will not be possible to explore all of these possibilities in the context of making a threshold market dominance determination.

Proponents of a broad market definition also argue that evidence of geographic competition has been used to support findings that the anticompetitive effects of mergers and consolidations are outweighed by the economic efficiencies to be gained. This Commission has recognized in cases under section 5(1) of the Interstate Commerce Act that competition from carriers serving other sources and other destinations will, over a long enough period of time, tend to mitigate a rail carrier's market power. But this prospect does not amount to the "effective competition" which is required by the 4R Act. For there to be effective competition such as would make rate regulation unnecessary, there would have to be the likelihood of a substantial diversion of traffic within the time period during which the rate

in issue is in effect, and often a shift in supply and distribution patterns is a costly and time-consuming process.

Several of the parties have argued that the *Du Pont* case would support by analogy the substitute commodity theory of effective competition. They would find competition where a shipper or consignee can meet its requirements by shipping or receiving a substitute commodity which is moved by another carrier. The *Du Pont* case is not strictly analogous, as it involves an alleged monopoly in the sale of a product, while here we are concerned with market dominance in the sale of a service. Just as the Court's focus was broadened from cellophane to flexible wrapping materials in *Du Pont*, our focus must include not only rail transportation, but the totality of available transportation services. Thus we are already faced with the complex question, parallel to that addressed in *Du Pont*, of whether the transportation services offered by various modes of transport are interchangeable. But to extend this analysis one step further and explore the question of whether a particular commodity is reasonably interchangeable from the shipper's standpoint would require extensive factfinding. If the substitute commodity is slightly different in terms of price or quality it may not be interchangeable, or the shipper may be forced to absorb the rate increase to the extent of the price differential before switching to the alternative commodity. Surely Congress did not intend to burden this Commission or the parties with such complex issues in making these threshold determinations.

The approach we took in *Navajo* to define the appropriate product market for the purposes of section 7 of the Clayton Act would also be appropriate here. In that case, after a careful analysis of relevant transportation circumstances, we determined that a particular class of carriers provides a unique transportation service which no other carriers, regardless of mode, can provide. Accordingly, the relevant product market was identified as "transportation by regular route motor common carrier of general commodities, with the usual exceptions, in LTL quantities, weighing 10,000 pounds or less."

Similarly, the relevant market for the purposes of the market share test is the range of transportation services available for moving a particular commodity from a particular shipper or shippers located at or near the origin area named in the tariff to a consignee or consignees at or near the named destination area. As the statute directs us to take into consideration the services offered by other carriers and other modes, these services will be considered in the calculation of market share if they are interchangeable.

As we assess the relevant product market for purposes of the 70 percent test it is essential to determine in a timely manner whether the services of other carriers are in fact reasonable substitutes and for this purpose shippers and carriers will be required to supply evidence of circumstances which may affect shipper ability to take advantage of services of other rail carriers or carriers of other modes.

As we have indicated, a number of parties believe that we should give consideration to potential competition in the application of our market share test. To some extent, our requirement that competing carriers must handle at least 30 percent of the traffic accounts for potential competition. Where existing for-hire carriers already handle 30 percent of the traffic, we assume that they would ordinarily be in a position to handle more should the traffic be diverted by higher rail rates. On the other hand, the prospect of competition from carriers not already in the market is necessarily more speculative. It will often be difficult to determine at what level of rates additional competitors would enter the market, and how much time it would take for these carriers to increase their capacity to handle the traffic. Also if no carriers of a particular mode are currently servicing a particular market, then there is a question as to whether transporting the involved commodity by this mode would be economically feasible.

We do not wish to preclude carriers from presenting evidence of potential competition to rebut the presumption of market

dominance under the market share test. However, general allegations of potential competition can be given little weight. The railroads must affirmatively show that there is a probability that additional carriers will enter the market as a result of the proposed rate increase. They will be required to establish the existence of carriers on the edge of the market who have the necessary authority where relevant, and equipment to serve the shippers in question. Where possible, the rail carrier should present evidence of the current rates charged by these potential competitors. In addition, evidence of whether or not diversion resulted in the past as a result of similar rate increases would be highly relevant.

The proposal that we consider competition from carriers who would enter the market but for regulation is totally without merit. This Commission is required by the Interstate Commerce Act to certify motor carriers according to a standard of public convenience and necessity. If a carrier does not have operating authority, then by definition it cannot enter the market, and cannot provide effective competition. The proposal seems to imply that the certification process is designed to protect rail carriers from motor competition. To the contrary, a shipper is entitled to the advantages inherent in a particular mode of service, and motor carriers are not excluded from the market to protect the interests of rail carriers.

The existence of private carriage in a market cannot be given the same consideration as traffic moving for-hire, as private carriage does not have the same competitive impact. The private carriage of one company cannot be said to compete for the traffic or movements of another. Such private carriage is not an alternative service which vies for the traffic of other firms. Furthermore, it is difficult to conceptualize how a firm's private carriage could actively compete for its own traffic, as ordinarily private carriage is used only when common carriers are unable to provide the particular service that the shipper needs. Private carriage is only profitable to the firm in those limited situations

where the company is large and diverse enough to decrease its empty-return ratio by arranging backhauls. The cost of private carriage may be said to set a ceiling above which rail carriers cannot raise their rates without fear of losing the traffic. The problem is that there is no assurance that this ceiling will be low enough to assure just and reasonable rates. Especially where private carriage is inefficient, or where the inherent advantages of rail transport over motor transport are great, private carriage could not be considered as effective competition within the meaning of the 4R Act.

Traffic moving by exempt carriage will be considered in calculating market share where adequate tonnage figures are available. However, there may be problems in this area because usually neither the shipper protestant nor the railroad know to what extent other shippers taking the rate use exempt carriers. If shippers and carriers have difficulty in presenting market share evidence where exempt commodities are involved, it may be necessary in the future to devise presumptions and procedures applicable to this area. [353 I.C.C. 900-909]

• • •

Findings

We find that implementation of the standards and procedures contained herein would enable the Commission to make prompt determinations as to market dominance without undue delay, in accordance with the congressional intent expressed by section 202 of the Rail Revitalization and Regulatory Reform Act of 1976.

We further find that the proposed rules are sound, equitable, and reasonable, and that the principles contained therein should be adopted, subject to consideration of further comments in this proceeding.

And we further find that this is not a major Federal action significantly affecting the quality of the human environment

within the meaning of the National Environmental Policy Act of 1969. [353 I.C.C. 930-931]

• • •

APPENDIX D

Legislative history of market dominance

Since the Transportation Act of 1958, there has been discussion of Interstate Commerce Commission ratemaking reform. The first proposal approved by either House of Congress was contained in the Surface Transportation Act of 1974¹ which was passed by the House in October 1974, but was never taken up by the Senate. Section 306 of that act, in addition to tightening standards for Commission suspension of rate changes, would have removed the Commission's suspension power within a 7-percent up or 7-percent down "no-suspend zone."

When DOT offered its proposed Rail Revitalization Act of 1975² it again proposed a "no-suspend zone" as the key means of affording rate flexibility to the railroads. This version of the "no-suspend zone" would have allowed, without risk of suspension, a 7-percent increase or decrease in the first year, 12 percent the second year, and 15 percent each year thereafter.

This proposed regulatory reform was viewed as a way of according rate flexibility to the railroads — a policy which would have various benefits in the eyes of various proponents. To DOT and the Administration sponsors of the "no-suspend zone" provision, rate flexibility would lead to increased competition and was "specifically designed to cause a reduction in rates which are too high and are inequitable to shippers and consumers."³ The railroads also valued rate flexibility, but for a

¹H.R. 5385, 23d Cong. [sic], 2d Sess. (1974).

²H.R. 7681, 94th Cong., 2d Sess. (1975) (the "DOT Bill").

³DOT press release dated May 19, 1975 to announce that the President had sent the Administration's "Railroad Revitalization Act" to Congress.

different reason. According to Stephen Ailes, president of the Association of American Railroads (AAR), rate regulation holds rates down and costs the railroads the additional revenues which would become available given rate flexibility.⁴ Secretary of Transportation Coleman took the middle ground by finding that rate flexibility would both raise and lower rates. "The ratemaking provisions of the [proposed DOT] Act will cause a reduction of rates that are too high and unfair to shippers, and will cause an increase of rates that are too low and not compensatory to carriers."⁵ Thus, it is evident from this testimony that rate flexibility has meant many different things to different people.

Although the DOT bill was introduced in the Senate, it appears that the Subcommittee on Surface Transportation of the Senate Commerce Committee rejected the Administration's concept of rate flexibility embodied in a no-suspend zone. Instead, S.2265 which was introduced by Senator Hartke, the Chairman of the Surface Transportation Subcommittee, and which formed the basis of the Senate version of the final bill, contained a "market dominance" provision which was a completely novel and creative approach.⁶ In this provision Commission regulation of maximum rates was limited to situations

⁴Hearings on Legislation Relating to Rail Passenger Service Before the Subcommittee on Surface Transportation of the Committee on Commerce of the United States Senate, 94th Cong., 1st Sess., Part 4 at 291-92 (1975) (hereinafter cited as Senate Hearings).

⁵Statement by U.S. Secretary of Transportation, William T. Coleman, Jr., on the Railroad Revitalization Act at the White House News Conference, Washington, D.C., Monday, May 19, 1975.

⁶It has been suggested that Canadian provisions limiting rate regulation to captive shipper situations might be a precedent for the Senate provision; but there is no mention of the Canadian legislation in the legislative history, and the Canadian captive shippers concept seems too far removed from market dominance for the Canadian experience to have any direct bearing on the definition and application of the market dominance concept.

where the carrier had "market dominance." In this initial S.2265 draft market dominance was defined as follows:

"Market dominance" means with respect to a carrier subject to this Act, the ability to charge as a consequence of the absence of effective competition, from the carriers or from other modes of transportation, a rate that unreasonably exceeds the cost of providing the service involved.⁷

AAR, while favoring the rate flexibility contemplated in the Administration's no-suspend zone proposal, strongly opposed the market dominance concept on the ground that it would lead to burdensome litigation and would "establish an upper limit on rate adjustment flexibility."⁸

DOT continued to advocate its no-suspend zone rate flexibility as a way to avoid "delays costs, uncertainties and mistakes."⁹ Nevertheless, DOT found the market dominance concept a meritorious and important alternative, so long as there was involvement of the "Department of Transportation in the process for determining the standards for market dominance in order to counterbalance the tendency of the Commission to see monopoly where none exists."¹⁰

ICC comments on the original market dominance provision reflected general approval of the concept that maximum rate regulation is not necessary where competitive market forces are sufficient to protect the public from unreasonably high rates. Serious questions, however, were raised about the workability of the provision as drafted. In particular, the Commission was concerned that the analogy to antitrust concepts could lead to a great deal of highly complex antitrust-type litigation. In addition, the Commission was concerned that the definition of

⁷S.2265, 94th Cong., 1st Sess. §103 (a)(5)(B)(ii)(1975).

⁸Statement of Stephen Ailes, Senate Hearings, Part 4, at 1002.

⁹Statement of Secretary Coleman, Senate Hearings, Part 4, at 1017.

¹⁰*Id.*, at 1917-18. See also Senate Hearings, Part 5, at 1745-46.

market dominance cover oligopoly as well as pure monopoly situations.¹¹

The Commerce Committee and the staff redrafted the market dominance provision into the form in which it appeared in section 103 of S.2718 reported by the Committee to the Senate on November 26, 1975.¹² This version continued to reject the DOT concept of rate flexibility embodied in the no-suspend zone pro-

¹¹Statement of The Honorable George M. Stafford, Chairman of the ICC, Senate Hearings, Part 4, 974-76.

¹²S. Rep. No. 94-499, 94th Cong., 1st Sess. (1975). The market dominance provision in section 103 of S.2718 was reported as follows:

(5)(A) *** Notwithstanding any other provisions of this part, no rate shall be found to be unjust and unreasonable, on the ground that such rate exceeds a just or reasonable maximum for the service rendered or to be rendered unless the Commission has first found that the proponent carrier has market dominance over such service. A finding that a carrier has market dominance over a service shall not create a presumption that the rate or rates for such service exceed a just and reasonable maximum ***.

(B) As used in this paragraph, the term- (i) "market dominance" refers to an absence of effective competition for the traffic to which a rate applies from other carriers or modes of transportation. Market dominance shall be presumed to exist if, prior to or after the publication of a rate, no shipment (except an occasional or emergency shipment) of the traffic to which the rate applies has moved by any carrier or mode of transportation, other than by the proponent carrier during the 12 months preceding the commencement of the Commission's proceeding to determine or investigate the lawfulness of the rate as a result of the relationship of the applicable rate (or cost of service in the case of a private carrier) of any other carrier or of any other mode (including exempt and private carriers) of transportation, to the rate of the proponent carrier; and (ii) "rate" means any rate or charge for the transportation of persons or property.

[footnote continued]

posal, and responded to ICC concerns by defining market dominance in terms of "an absence of effective competition for the traffic to which a rate applies from other carriers or modes of transportation," and by making clear that it is the proponent carrier or carriers proposing the rate which must have market dominance.

In addition, section 103 provided specifically for market dominance determinations to be made in accordance with rules "designed to provide for a practical administrative determination without delay." These changes abated in substantial part the ICC's previously expressed concerns regarding its ability to protect the public in oligopoly situations and the danger of becoming bogged down in antitrust-type litigation. The Senate Committee did not respond to the DOT request that it be given a direct role in formulation of market dominance regulations. Instead, it left standing the language of S.2265 which provided

[footnote continued]

(C) Within 240 days after the date of enactment of the Rail Services Act of 1975, the Commission shall establish, by rule, standards and procedures for determining, in accordance with section 15(8) of this part, whether and when a carrier possesses market dominance over a service rendered or to be rendered at a particular rate or rates. Such rules shall be designed to provide for a practical determination without delay. The Commission shall solicit and consider the recommendations of the Attorney General and of the Federal Trade Commission in the course of establishing such rules.

(b) Section 15 of the Interstate Commerce Act (490 U.S.C. 15) is amended by renumbering paragraphs (8) through (14) thereof as paragraphs (9) through (15) thereof, respectively, and by inserting therein a new paragraph (8) as follows:

(8) Whenever a rate is challenged as being unreasonably high, the Commission shall, upon complaint or upon its own initiative and within 90 days after the commencement

[footnote continued]

an advisory role for the FTC and Justice Department, Antitrust Division, but not for DOT.¹³

The Senate Commerce Committee Report indicates that the Committee favored balancing the railroads' needs for rate flexibility with protection for shipper interests. In its discussion of the market dominance concept the report states:

Commission regulation of maximum rate levels will apply only when the railroad or railroads publishing a rate increase set [sic] market dominance over the service involved. Otherwise, in truly competitive markets the railroads will have freedom, absent discrimination

[footnote continued]

of a proceeding to investigate the lawfulness of such rate, determine whether the carrier proposing such rate has market dominance, within the meaning of section 1(5)(B)(i) of this part, over the service to which such rate applies. If the Commission finds that a carrier does not have such market dominance, such finding shall be determinative in all additional or other proceedings concerning such rate or service, unless (A) such finding is modified or set aside by the Commission, or (B) such finding is set aside by a court of competent jurisdiction. Nothing in this paragraph limits the Commission's power to suspend a rate pursuant to paragraph 7 of this section, except that if the Commission has found that a carrier does not have such market dominance over the service to which a rate applies, the Commission may not suspend any increases in such rate on the ground that such rate as increased exceeds a just or reasonable maximum for such service, unless the Commission specifically modifies or sets aside its prior determination concerning market dominance over the service to which such rate applies.

¹³It should also be noted that this Senate Committee draft added a presumption to the market dominance definition. Without binding the Commission's hand in any other fashion, the presumption called for a market dominance finding when no competitive carrier had moved the traffic in 1 preceding year.

and prejudice, to raise prices as they choose in order to maximize revenues.

The key to this new provision is in the definition of market dominance. Market dominance is defined in terms of the lack of effective competition avoids the problems of defining monopoly power which have arisen under the antitrust laws. Under this definition the publishing carrier need not have monopoly power. Rather the test will be whether the market itself is sufficiently competitive to insure just and reasonable rates. Thus, the Commission will be able to regulate maximum rates in oligopoly or concentrated markets as well as in monopoly markets. Lengthy antitrust-type litigation will be avoided by virtue of the Commission's authority to adopt rules of practical application which will identify markets in which dominance exists.

The market dominance test is not designed to be an ultimate regulatory standard. Instead, it is designed as a threshold test to direct the Commission's regulatory activities into areas where the public interest needs protection, while deregulating and giving flexibility to the railroads in areas where effective competition from other railroads and other modes can supplant the need for maximum price regulation.¹⁴

In addition, the report states that "ratemaking revisions to assist the railroads must continue protections for the public interest as a whole,"¹⁵ and that the Commission will continue to be able to regulate maximum rate tariffs unless there is effective competition which insures that rates do not exceed a just and reasonable level.¹⁶

¹⁴*Id.*, at 47.

¹⁵*Id.*, at 14.

¹⁶*Id.*, at 46.

There are, to be sure, references to assisting the railroads by relaxing rate regulation. For instance the report talks generally about the railroads need for more revenue:

*** If railroads are to increase their revenues and attract the resources necessary to revitalize the industry, they must be able to raise their rates in a timely fashion, free from regulation in markets sufficiently competitive to prevent abuses of monopoly power

***. [*Id.*, at 9-10].

In particular, there seemed to be a concern that railroads be relieved from regulatorily imposed cross-subsidization sufficiently to allow them to raise rates to a minimum variable cost level:

***The Commission has, on the one hand, frequently used the power it possesses to hold down rates, often to protect the movement of commodities that would otherwise be isolated geographically. This "cross subsidization" policy has been an important part of public transportation policy since the beginning of Commission regulation. Nevertheless, changes in the economic strength of the railroads and their ability to cross-subsidize seem to require some changes in that policy. [*Id.*, at 10-11.]

Committee action in the House of Representatives resulted in a House bill which was closer to the position of the Administration. Initially, in addition to DOT's proposed "Railroad Revitalization Act," Congressman Brock Adams of Washington introduced in H.R. 6351, a cut-down version of the Surface Transportation Act which had been passed the year before.

In hearings before the Subcommittee on Transportation and Commerce of the Committee on Interstate and Foreign Commerce of the House of Representatives, DOT and the railroads favored the no-suspend zone, rate flexibility approach, which

the ICC strongly opposed.¹⁷

After the hearings the subcommittee staff prepared a new bill, H.R. 9802, which was introduced by the Subcommittee Chairman, Congressman Rooney, on September 23, 1975. This new bill adopted the no-suspend zone approach of the Administration, but limited the no-suspend zone to 7 percent a year during a 3-year experiment.

Subsequently during the subcommittee mark-up on the bill a market dominance provision was added by the subcommittee staff. This provision was further refined by amendment offered by Congressman Skubitz, the ranking minority member on the subcommittee. This subcommittee version appears in section 301(g) and (h) of H.R. 10979, a "clean bill" reported to the Full Committee on December 3, 1975, by Chairman Rooney and the members of the Subcommittee following extensive work sessions marking up H.R. 9802.¹⁸

¹⁷Statement of the Honorable William T. Coleman, Secretary of Transportation, in hearings before the Subcommittee on Transportation and Commerce of the Committee on Foreign Commerce, the House of Representatives on Railroad Revitalization, Serial No. 94-38, 94th Cong., 1st Sess. 1975, at 151-157; Statement of Stephen Ailes, president of AAR, *Id.*, at 562-64; and Statement of The Honorable George M. Stafford, Chairman of the ICC, *Id.*, at 240-52.

¹⁸Subsections (g) and (h) of section 301 of H.R. 10975, as introduced on December 3, 1975, read as follows:

(g) Following the promulgation and review of the initial standards established pursuant to subdivision (h), no rate shall be found unjust or unreasonable on the ground that it is too high unless the Commission determines that the common carrier by railroad charging the rate has market dominance.

(h) Within 180 days after the date of enactment of this paragraph, and from time to time thereafter as may be necessary, the Commission, in conjunction with the Secretary, shall establish detailed standards and pro-

[footnote continued]

In this House subcommittee provision, as in the Senate provision, the Commission was required to find market dominance before finding a rate too high and the determination was to be made in accordance with rules to be adopted by the Commission. Nevertheless, the Senate definition of market dominance in terms of lack of effective competition was replaced by geographic and market share definitions. Moreover, the Commission was not given full discretion in promulgating rules to implement the provisions. Rather the rules were to be made "in conjunction" with DOT.

When the full Interstate and Foreign Commerce Committee held mark-up sessions on H.R. 10979, the market dominance provision was further amended in accordance with an amend-

[footnote continued]

cedures for determining whether and when a common carrier by railroad possesses market dominance over a particular rate or rates. In establishing such standards, the Commission and the Secretary shall define market dominance as any situation in which (i) in a particular geographical area, there are not at least two competing common carriers by railroad, or a common carrier by railroad and an alternate mode of transportation which both compete for the business of all shippers in such area; or (ii) with respect to any single commodity or type of goods, there are not at least two competing common carriers by railroad, or a common carrier by railroad and an alternate mode of transportation which provides transportation for such commodity or type of goods in a reasonably effective and competitive fashion.

In establishing such standards, the Commission and the Secretary shall also consider such factors as they find relevant, including: the size and assets of involved carriers; the transportation characteristics of the commodity or commodities involved; the degree of participation of regulated and unregulated carriers of the same and different modes of transportation in the services involved; the ease of entry of potential competitors; and the level of profit obtained in providing the particular transportation service involved.

ment introduced by Representative Dingell. This amendment conformed the House provision to the Senate provision by defining market dominance as "an absence of effective competition from the carriers or modes of competition." In addition, the requirement that Commission rules be made in conjunction with DOT was dropped and the Commission was only required to consider the recommendations of the Secretary of DOT, the Attorney General, and the Federal Trade Commission. Finally, the Dingell revision contained the important language from the Senate Bill to the effect that the Commission rules implementing the market dominance provision "shall be designed to provide for a practical determination without administrative delay."¹⁹

¹⁹The market dominance provision as amended by Representative Dingell reads as follows:

(h) Following the promulgation and review of the initial standards established pursuant to subdivision (i), no rate shall be found unjust or unreasonable on the ground that it is too high unless the Commission determines that the common carrier by railroad charging the rate has market dominance. As used in this paragraph, the term "market dominance" refers to an absence of effective competition from other carriers or modes of competition. Market dominance shall be presumed in any situation in which (i) in any geographical market there are not at least 2 competing rail carriers or a rail carrier and an alternative mode of transportation both of which compete for the business in the area, or (ii) with respect to any single commodity or type of goods there is the absence of competition between the rail carriers for transport of that commodity, or where there is only one rail carrier, the absence of a competing mode which in fact provides transportation for that commodity in a reasonably effective and competitive fashion.

(i) Within 240 days after the date of enactment of the Railroad Revitalization and Regulatory Reform Act of 1975, the Commission shall establish, by rule, standards and procedures for determining whether and when a car-

[footnote continued]

H.R. 10979 was passed by the House on December 17, 1975, without any further amendment to the market dominance provision. It was then immediately considered by a Senate-House Conference.

In this first Conference which made its report on December 19, 1975, the Senate version of ratemaking reform largely prevailed:

Conference substitute

The conference substitute follows the Senate bill except that —

(1) the conferees eliminated the provisions relating to a presumption of market dominance;

(2) the conferees adopted a modified version of the House provision on rate zone freedom. The conference substitute provides that a rate may be increased or decreased up to 7 percent (for 2 years) without being suspended unless the rate is unlawful or predatory or the carrier has market dominance over the rate.

(3) the conferees adopted a modified version of the House provision which requires any person seeking suspension to file an affidavit from which on its face, it appears that the complainant will be injured, and there are reasonable grounds for presuming that the rate will be found unlawful.²⁰

[footnote continued]

rier possesses market dominance over a service rendered or to be rendered at a particular rate or rates. Such rule shall be designed to provide for a practical determination without administrative delay. The Commission shall solicit and consider the recommendations of the Secretary, of the Attorney General, and of the Federal Trade Commission in the course of establishing such rules.

²⁰H.R. Rep. No. 94-768, 94th Cong., 1st Sess. (1975), at 122.

The bill as reported in the December 19 Conference Report was approved by both Houses on December 19, 1975, without any change in the market dominance provision. Nevertheless, the Christmas recess and a veto threat kept the bill from being enrolled and sent to the president.

In January 1976 the conferees met and worked out compromises, particularly in the area of funding, which made the bill acceptable to the President. Again the market dominance provision remained unchanged, but the new Report of the Committees of Conference on S.2718,²¹ elaborated on [sic] market dominance provision and specifically instructed the Commission to use a presumption relating to rate bureaus:

Conference substitute

Inasmuch as the new section 5b permits the consideration of rates free from the antitrust restrictions which would otherwise control competitive markets, the Committee of Conference intends that that [sic] there will be presumed to be an absence of effective competition between railroads with respect to any rate discussed or considered under an agreement approved by the Commission pursuant to new section 5b of the Interstate Commerce Act.***

The new Conference Report and Compromise Bill was approved by both houses and sent to the President, who signed it into law on February 5, 1976 as Public Law 94-210. [353 I.C.C. 940-947]

APPENDIX I

EX PARTE No. 320

**SPECIAL PROCEDURES FOR MAKING FINDINGS
OF MARKET DOMINANCE AS REQUIRED BY
THE RAILROAD REVITALIZATION AND
REGULATORY REFORM ACT OF 1976**

Decided September 30, 1976

Upon further consideration, findings in prior report, served August 23, 1976, modified in some respects, otherwise affirmed and clarified.

Report of the Commission on Further Consideration**By the Commission:**

This proceeding was instituted in compliance with section 202 of the "Railroad Revitalization and Regulatory Reform Act of 1976."¹ In the interim report, served August 23, 1976, standards and procedures for making market dominance determinations were adopted subject to further comment by the parties. Thirty-seven additional comments have been received from the railroads, shippers, shipper interests, and Government agencies. Although the response to the interim report has been generally favorable, the parties have suggested various modifications in the rules, some of which have been adopted. Our revised rules incorporating these changes are set forth in full in appendix A. In addition, it appears that certain matters treated in the interim report require clarification.

Upon consideration of the comments of the parties, we are persuaded that a rebuttable presumption of market dominance where a rate exceeds 160 percent of variable cost will more ac-

¹Hereinafter, the 4R Act.

curately reflect the absence of effective competition.² Available evidence indicates that railroad fully allocated cost approximates 129 percent of variable cost.³ If an allowance is made for Federal income taxes and a reasonable profit level, a ratio of fully allocated costs to variable costs between 140 percent and 150 percent (including margin for error) would appear to be the highest level at which a rail carrier could be said to possess only minimal market power. Where a rate exceeds 160 percent of variable cost, a rail carrier actually moving traffic thereunder will usually have substantial market power.

Some parties have argued that no single variable cost percentage can account for all cost levels which may vary significantly from commodity to commodity. The Department of Justice (Justice) notes that a higher percentage would be more appropriate for those movements which reflect higher ratios of fully allocated cost to variable cost. We believe that the use of a single average percentage figure presents less difficulty in application and would lead to more accurate determinations than the proposed alternatives. At the same time, we recognize that exceptional situations will exist where the particular ratio of fully allocated to variable cost may vary significantly from the average 129-percent figure. In these unusual instances, any party may show that the 160-percent figure would not reflect the actual costs of the traffic or movement in issue, and state the special circumstances which the Commission should consider. We believe this approach to be superior to the use of a variable percentage based on the commodity groups, which appears to be unwieldy and difficult to administer.⁴

²The presumption set out in the interim report would have become operative when a rate exceeded 180 percent of variable cost.

³See "Railroad Carload Cost Scales of 1973," Interstate Commerce Commission Bureau of Accounts, Statement No. 1C1-73, p. 150.

⁴The rail revenue contribution studies are based upon the carload waybill sample. See *Investigation of Railroad Frt. Rate Structure - Coal*, 345 I.C.C. 493, 534, where infirmities in the waybill study are discussed.

It must also be remembered that the standard set forth herein and in the interim report is not rigidly fixed. The Commission is presently in the process of complying with section 307 of the 4R Act in docket No. 36367, Revision to the Uniform System of Accounts for Railroads, 41 F.R. 33016, August 6, 1976. Standards adopted in that proceeding may result in the need for reformulation of this presumption at some future date. As with all other standards and procedures adopted herein, the Commission will continue to reassess their usefulness and accuracy in the light of actual experience.

We reiterate that a finding of market dominance based on the relationship of the rate in issue to the variable cost of the service does not necessarily imply that the rate is unjust or unreasonable. The market dominance test is merely a threshold determination to direct the Commission's attention to those situations in which competitive forces may be insufficient to insure just and reasonable rate levels.

Several minor changes in the language of the regulations have been adopted. Section 1109.1(a)(4) has been amended to provide that information should be submitted whenever the rate in issue has been docketed before a rate bureau. We agree with the contention of the Drug and Toilet Preparation Traffic Conference that analysis of the docketing procedure may better permit the Commission to determine the existence of tacit collusion where two or more similar rates are published under right of independent action at or about the same time.³ A new section 1109.1(a)(8) has been added to emphasize further that the railroads may produce any relevant evidence pertaining to the issue of market dominance. Section 1109.1(c) has been amended to make it clear that railroads and shippers alike are not required to produce information which cannot realistically be ob-

³However, we cannot agree with the contention that the rate bureau presumption should be triggered by mere publication of a rate by a rate bureau without evidence of docketing, discussion consideration, or approval of the rate at issue.

tained by them. We note that pleadings in a market dominance proceeding will be verified. In addition, the Commission will seek to ascertain that information alleged to be practicably unavailable is in fact unavailable.

Section 1109.1(d) has been amended to permit the complainant in any formal complaint proceeding in which the issue of market dominance is raised to file a reply to any verified answer to the complaint. Any such reply must be filed within 10 days of the due date for filing an answer, and must be limited to the issues relating to market dominance raised in the answer. This exception to the Commission's General Rules of Practice is justified in order to narrow the Commission's focus and permit these complex issues to be developed more fully. The narrower time constraints in proceedings to suspend a rate prevent any similar treatment there.

Finally, two minor changes have been made in the language of the presumptions to conform them to the intent of the Commission expressed herein and in the interim report. Section 1109.1(g)(1) has been amended to provide that any carrier which participates in the rate will have its market share included in any computation of the market share of the "proponent carrier." Section 1109.1(g)(3) has been amended to emphasize our intent that rail-related facilities be considered within the scope of the substantial investment presumption.

The first matter which requires clarification is the manner in which the presumption will be applied. The Department of Transportation (DOT) expressed the opinion that "where market dominance is proven under one or more tests, and effective competition under one or more of the others, the presumptions would effectively cancel one another out." This statement reflects a misunderstanding of the rules. As was noted in the prior report, the presumptions do not imply their converse.⁶ A

⁶Interim report, p. 20, 21.

protestant need establish only one presumption at which point the burden of coming forward with evidence of effective competition shifts to the proponent of the rate. Any relevant evidence of effective competition, as outlined in the interim report,⁷ can be offered to establish effective competition. This may be evidence which relates to one of the presumptions, or it may be other relevant evidence. Nevertheless, it should not be inferred that proof that a particular presumption does not apply necessarily rebuts any other presumption.

The railroads argue that the standards and procedures adopted herein result in an unauthorized shifting of the statutory burden of proof, insofar as they require the railroads to produce certain evidence in proceedings in which they do not have the burden of proof. They claim that such a result would violate the revised section 15(8)(d) of the Interstate Commerce Act.

A clear distinction should be drawn between the burden of proof in the sense of the burden of persuasion and the burden of producing evidence.⁸ The requirements contained herein impose on all parties the burden of producing certain available evidence in a limited number of situations in which they may not have the ultimate burden of persuasion. As we have pointed out in the interim report, the party best able to present particular evidence should do so in each proceeding in order to foster informed Commission decisions in all proceedings involving market dominance. However, the burden of persuasion at the suspension level remains on the protestant, who must affirmatively demonstrate the existence of market dominance. The burden of proof in any proceeding is merely the burden of persuading the finder of fact that the interpretation of evidence urged is correct. In all instances where the shipper has the statutory burden

⁷Interim report, p. 98-101.

⁸See, for example, rule 301 of the Federal Rules of Evidence. See also, McCormick, "Evidence" (1954), sections 306 and 307.

of proof, he must still persuade the Commission that the rail carrier's interpretation of the evidence adduced is not factually accurate. Even where the evidence would give rise to a rebuttable presumption, adequate explanation would lead to a finding that market dominance does not exist.

In view of the directive in section 12(1)(a) of the act that the Commission obtain from carriers any information necessary to execute and enforce the provisions of part I of the act, and in view of the necessity for this information, we are convinced that the railroads should be required to submit information to the Commission in the manner outlined in the interim report.

Several misconceptions have arisen regarding the operation of the rate bureau presumption contained in section 1109.1(f). Some of the parties have indicated that they do not understand the effect of the presumption. We state emphatically that rate bureau activity does not lead to a presumption of market dominance, per se. The effect of this presumption is to preclude those carriers which participate in a rate bureau published rate, or have discussed, considered, or approved that rate, from being considered effective competitors to the proponent rail carrier.⁹ In spite of rate bureau activity there may be effective competition from nonparticipating rail carriers, or carriers of other modes.

We cannot agree that this presumption should be made conclusive rather than rebuttable, nor can we agree with the contention that collusive price fixing is the only reason for the use of rate bureaus. Rate bureau procedures serve as a forum for ship-

⁹As indicated in the interim report, the presumption includes both formal and informal collective action. The presumption also includes discussions of such carrier groups as the Uniform Classification Committee, National Diversion and Reconsignment Committee, National Perishable Freight Committee, and AAR committees, some of which may not be subject to any specific procedures under section 5a or 5b agreement.

ing September 30, 1981;

(B) 165 percent during the period beginning October 1, 1981, and ending September 30, 1982;

(C) 170 percent during the period beginning October 1, 1982, and ending September 30, 1983;

(D) 175 percent or the cost recovery percentage, whichever is less, during the period beginning October 1, 1983, and ending September 30, 1984; and

(E) the cost recovery percentage, during each 12-month period beginning on or after October 1, 1984.

For purposes of subparagraphs (D) and (E) of this paragraph, the cost recovery percentage shall in no event be less than a revenue-variable cost percentage of 170 percent or more than a revenue-variable cost percentage of 180 percent.

(3) For purposes of determining the revenue-variable cost percentage for a particular transportation, variable costs shall be determined pursuant to section 10705a(m)(1) of this title, with adjustments specified by the Commission. A rail carrier may meet its burden of proof under this subsection by establishing its variable costs in accordance with such section 10705a(m)(1), but a shipper may rebut that showing by evidence of such type, and in accordance with such burden of proof, as the Commission shall prescribe.

(4) A finding by the Commission that a rate charged by a rail carrier results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than the applicable percentage under paragraph (2) of this subsection does not establish a presumption that (A) such rail carrier has or does not have market dominance over such transportation, or (B) the proposed rate exceeds or does not exceed a reasonable maximum.

(5)(A) Within 180 days after the effective date of the Staggers Rail Act of 1980 and on an annual basis thereafter, the Commission shall determine the cost recovery percentage for the transportation of all traffic received by rail carriers. The Commission shall make such determination after considering each individual revenue-variable cost percentage resulting from the revenues and costs of a valid and reliable statistical sample of all movements of commodities transported by class I rail carriers during the most recent calendar year for which such information is available.

(B) If, on the basis of calculations under subparagraph (A) of this paragraph, the Commission determines that revenues earned by all class I rail carriers during the previous calendar year do not exceed the fixed and variable costs of such carriers, then the cost recovery percentage for purposes of this section shall be deemed to be equal to the cost recovery percentage last determined by the Commission.

(C) The Commission shall, in its annual report submitted to the Congress under section 10311 of this title, set forth the cost recovery percentage determined for that year under subparagraph (A) of this paragraph.

Section 202(b) of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 34-35 provided:

(b) Section 1(5) of the Interstate Commerce Act (49 U.S.C. 1(5)), as amended by subsection (a) of this section, is further amended by adding at the end thereof the following new subdivisions:

"(b) Each rate for any service rendered or to be rendered in the transportation of persons or property by any common carrier by railroad subject to this part shall be just and reasonable. A rate that is unjust or unreasonable is prohibited and unlawful. No rate which contributes or

pers to express their views concerning particular rate proposals and contribute to the publishing of rates responsive to shipper needs. Carrier foreknowledge of substantial shipper objections to a rate bureau docketed proposal will often permit informal settlements and prevent unnecessary litigation.

However, in view of the limited effect of the presumption and the strongly expressed congressional intent to afford the public either the protection of the antitrust laws or maximum-rate regulation, we believe it is appropriate that rebuttal of this presumption be limited to evidence that the assailed activity could not reasonably have had an anticompetitive effect.¹⁰ For example, this might entail a showing that committee or research group work was so narrow in scope that the action would not be prohibited by the antitrust laws.

While the effect of this presumption will ordinarily be limited to rail carriers, it should be pointed out that in instances where joint rates involving both rail carriers and carriers of other modes are in issue, the presumption will apply equally to those carriers of other modes which participate in the rate or any discussion, consideration, or approval of the rate.

DOT argues that the limited rate bureau presumption should be eliminated and that rate bureau activity is sufficiently covered in the market share presumption.¹¹ However, the many problems inherent in obtaining sufficient data to permit a workable market share test have been discussed at length in the interim report. For example, it may be very difficult to obtain

¹⁰With all other presumptions contained herein, rebuttal is not limited to the basic facts on which the presumption lies and may be accomplished by any evidence sufficient to show that effective competition exists.

¹¹This presumption provides that the market share of the proponent carrier shall be deemed to include the market share of carriers participating in rate bureau activities. See section 1109.01(g)(1).

data concerning the total share of the market held by all carriers participating in rate bureau activity,¹² and data on traffic handled by unregulated carriers may be unavailable. In such situations, the rate bureau presumption will remain an appropriate and necessary means of facilitating our market dominance determinations.

One other minor point has been raised regarding the application of the principal-agent test¹³ to rate bureau activity. As was noted in the interim report, the test will be applied only where a rate proposal receives no consideration or discussion other than by a rate bureau committee or research group, and the proponent carrier is not directly represented on the committee or group. In this narrow situation, our focus will concentrate on whether the committee or group is working on behalf of the proponent carrier or is conducting an independent study. In all standards and procedures adopted herein, our concern is with substance rather than form.

Several parties have noted that problems may arise from using traffic statistics based only on the previous year to determine market share. Data may not be representative because of unusual circumstances such as car shortages, strikes, embargoes, or unusually high demand. If a party believes that data derived from the prior year is not representative, it should explain the circumstances and present supporting data if possible. Where rates on new traffic are challenged and no prior statistics are available, the parties should indicate any carriers which they believe will be able to handle the traffic.

Several parties have raised questions concerning our treatment of evidence of private carriage.¹⁴ The railroads and the Federal Trade Commission (FTC) argue that private carriage has a

¹²For this reason, we have indicated in the interim report (p. 93) that estimates may be used in this one instance only, *provided* that adequate explanation of the basis for such estimates is also provided.

¹³See p. 27, interim report.

¹⁴Interim report, p. 61.

significant impact upon rail rates and that it should be included in market share calculations, while Justice and DOT also indicate that private carriage should be considered in some manner. In the discussion of the market share test in the previous report we stated that the existence of private carriage cannot be given the same consideration as traffic moving for-hire because private carriage does not have the same competitive impact.¹³ The market share test is based on the proposition that if a railroad's competitors are already handling 30 percent or more of the traffic, the competitive service is likely to be a commercially feasible alternative. The essential problems with considering private carriage are that the private fleet of one firm does not compete for the traffic or movements of another and that the cost to the shipper of transfer to private carriage is frequently prohibitive. Thus, the carrier who raises its rates risks losing only the traffic of those shippers who are in a position to use private carriage. Therefore, we conclude that private carriage should not be included in the calculation of market share.

Justice has suggested an alternative approach. It believes that private carriage can provide effective competition where those firms capable of establishing private carriage account for a significant fraction of the goods moving under a rate in issue. We agree that where a substantial amount of the traffic moving under the rate in issue is tendered by shippers who are currently using private carriage there is a potential for diversion sufficient to prevent carriers from taking unreasonable rate increases. On the other hand, if the traffic accounted for by shippers also using private carriage is small, this factor is not likely to have a significant impact on ratemaking. Thus if the Commission is to assess the impact of private carriage in a particular situation it is essential to know (1) which shippers are using private carriage, (2) the percentage of the traffic moving under the rate in issue which is accounted for by the shippers, (3) the extent to which

¹³ *Id.*

they use private carriage, and (4) whether the cost of further use of private carriage would be prohibitive. We conclude that private carriage should be considered as rebuttal evidence where the proponent demonstrates that private carriage currently has a significant impact on carrier ratemaking.

Several questions have been raised regarding what investments would qualify under the rail-related equipment presumption. This would include shipper investment in loading and unloading facilities, railcars, rail siding, loop tracks, and any other facilities which are dedicated to rail transportation.

Justice has argued that rolling stock should not necessarily be treated as a fixed investment which makes shippers captive, because cars can often be sold with little or no capital loss. Certainly the marketability of the equipment or facilities is an important factor in determining whether use of the services of another mode would be impossible or highly impractical.

DOT has made the following observation with regard to this presumption:

If fifty percent of the shippers affected by a proposed rate are free to move to another mode, it is unlikely that the railroad would raise its rate so high as to force them to do so. Such pricing by the railroads would result not only in the immediate loss of fifty percent of the traffic, but would also cause the fifty percent with substantial investments not to reinvest once the original facilities wore out.

Essentially, this position is consistent with the statement in the interim report that the presumption can be rebutted by a showing that the preponderance of the traffic in terms of volume is tendered by shippers who have not made substantial investments in rail-related equipment.¹⁶ Here the rail carrier is in the best position to supply this aggregate tonnage data which relates to the traffic of its own customers.

Another question which was raised in the comments is whether the presumption relating to investment in rail-related

¹⁶Interim report, pp. 77-78.

equipment made in the future should be included in the presumption. DOT and Justice believe that the revised section 15(19) of the act provides adequate rate protection for shippers in these situations. This section is applicable only if the rates are filed on 180 days' notice,¹⁷ pursuant to a special procedure. A finding under section 15(19) and the proposed procedures is optional because a carrier may always elect to file the rate under section 15(8), subject to normal investigation and suspension-procedures.¹⁸

Moreover, section 15(19) relates only to situations where the investment in question exceeds \$1 million. An investment may be substantial to a relatively small shipper despite the fact that it does not exceed a particular dollar amount. What is more relevant in the context of market dominance is the size of the investment in relation to the shippers' total production and transportation costs, and the cost and time which would be involved in preparing to use the services of another mode. These are the factors which will be considered in determining the extent to which these investments make it impossible or highly impractical for shippers to take advantage of services offered by other modes.

Finally, we wish to stress once more that the presumptions adopted herein are not the exclusive means of proving market dominance. If a preponderance of any other relevant evidence¹⁹ indicates that effective competition for the traffic or movement to which the rate applies does not exist, a finding of market

¹⁷The proposed procedures are set forth in the Notice of Proposed Rulemaking in Ex Parte No. 327, Rate Incentives for Capital Investment, served July 29, 1976.

¹⁸Rates qualifying under the new capital incentive section may not be suspended or set aside as unlawful under section 2, 3, or 4 of the act. Essentially this protects shippers and carriers alike against a finding by the Commission that the tariff prefers or discriminates in favor of the shipper taking the rate as opposed to other shippers.

¹⁹See interim report, pp. 98-102.

dominance will be made. All relevant evidence presented by both sides will be given full consideration.

As experience is gained in the implementation of the concept of market dominance, refinements, and modifications may be required. Accordingly, this proceeding will remain open so that parties and other concerned persons may petition for any changes they believe are necessary. The continuing nature of this proceeding will permit reevaluation of the various standards and procedures, based upon actual experience. The Commission will continue its effort to achieve the sensitive balance between the need for rail carriers to be relieved from rate regulation in competitive markets and the need of the public to be protected from unwarranted rate increases where competition will not insure such protection, in accordance with the intent of Congress. It is the Commission's purpose to implement the congressional statement of policy in Public Law 94-210 to provide for ratemaking reform, to give rail carriers greater freedom to raise and lower rates without Commission intervention, and to foster competition among railroads and between the railroads and the other modes of carriage.

All discussion and conclusions contained in the interim report, to the extent not modified herein, are hereby incorporated by reference into this report.

Findings

We find that implementation of the standards and procedures contained herein would enable the Commission to make prompt determinations as to market dominance without undue delay, in accordance with the congressional intent expressed by section 202 of the Rail Revitalization and Regulatory Reform Act of 1976.

We further find that the proposed rules set out in appendix A are sound, equitable, reasonable, and necessary, and should be adopted as specified in the attached order.

And we further find that this is not a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental Policy Act of 1969.

An appropriate order will be entered.

Commissioner Corber, concurring:

Although my concurring expression in the interim report suggested a rationale for establishing the point of activation of the third presumption at 50 percent in excess of variable costs rather than 80 percent, I am not in disagreement with the 60-percent figure prescribed in the report and order on further consideration. The stated basis for the 60-percent trigger is more soundly grounded than the one for 80 percent. Moreover, we are at the very beginning of our experience with the market dominance concept and an approach reasonably weighted toward rate flexibility is consistent with the intent of the 4R Act. In this connection I note with approval that the presumption is not to be taken as rigidly fixed and that it will be reassessed on the basis of experience. There are recognized infirmities in existing cost figures which support the use of a percentage leaving ample room for error. As the accounting systems of the carriers, as well as those prescribed by the Commission, improve there will be better data with which to improve the accuracy of this presumption. Finally, I reemphasize what I stated in regard to the interim report, that the presumption does not determine the justness or reasonableness of any rate. It merely indicates the rates which must be scrutinized in accordance with the usual tests for justness and reasonableness.

APPENDIX A

PART 1109 REQUIREMENTS AND PROCEDURES RELATING TO THE RAILROAD REVITALIZATION AND REGULATORY REFORM ACT OF 1976

§1109.1 Requirements and Procedures Relating to a Determination of Market Dominance with Regard to Rates Challenged as

Unreasonably High.¹

(a) In order that the Commission may determine whether a rail carrier proposing a rate increase possesses market dominance over the service to be rendered under a proposed rate, there shall be included in the carrier's statement notifying the Commission that it wishes to have the proposed rate considered pursuant to section 15(8)(c) of the Interstate Commerce Act, evidence upon which the Commission may base a determination with regard to market dominance, to the extent available, and including but not limited to the following information: (1) descriptions of involved commodities and full seven-digit STCC number(s); (2) descriptions of involved points or areas and mileage(s), stated in terms of short line mileage by rail; (3) the variable cost of the service to which the rate applies; (4) whether and to what extent the rate in issue has been docketed, discussed, considered, or approved before a rate bureau acting under an agreement filed with and approved by the Commission pursuant to section 5a or 5b of the Interstate Commerce Act; application number(s), date proposal docketed with rate bureau, and final disposition of proposal and date thereof; and the share of the market, or an estimate thereof, presently held by such participating carriers; (5) tonnage of the involved traffic transported between the involved points or areas by the proponent carrier and its affiliates during the preceding year, and the rates charged therefor during the same time period; (6) names of any known originating for-hire carriers of any mode offering interchangeable service between the involved points or areas, the tonnage transported and the rates charged therefor during the preceding year; (7) the extent to which the proponent rail carrier has taken general increases approved by the Commission in the preceding 2 years; (8) any other relevant information.

(b) In all proceedings involving a request for suspension of a proposed rate on the ground that it is unreasonably high there shall be included in the verified complaint seeking suspension of

¹As used in this section, the term rates includes fares and charges.

the schedule containing the proposed rate,² evidence upon which the Commission may base a determination with regard to market dominance, including the information outlined in subparagraphs (a)(1)-(7), to the extent available and not previously furnished by the rail carriers, and including but not limited to the following information: (1) characteristics of the involved traffic or movement affecting the ease or difficulty with which transportation services of other carriers or modes may be substituted for the service to be performed under the rate in issue; (2) tonnage of the involved traffic transported between the involved points or areas by any known for-hire carriers, other than those in subparagraph (a)(5), during the preceding year, and the rates charged therefor during the same time period; (3) any other relevant information.

(c) Any reply to a verified complaint seeking suspension should contain any information required by §1109.1(a) and (b), to the extent not previously furnished by complainant. Whether or not a reply to a verified complaint seeking suspension is filed, the proponent rail carrier on or before the due date for filing a reply, must provide the Commission with the information required by §1109.1(a) to the extent available and not previously submitted by another party.

(d) A formal complaint containing an allegation that an existing rail rate is unreasonably high shall contain verified evidence upon which the Commission may base a determination with regard to market dominance, including, to the extent available, the information outlined in §1109.1(a) and (b). The answer to a formal complaint shall be verified and shall contain the information outlined in §1109.1(a) to the extent not previously furnished. Replies limited to the issues of market dominance raised by any verified answer, may be filed within 10 days of the due date for the filing of such answer.

²Section 15(8)(d) of the Interstate Commerce Act as amended requires that complainants [sic] seeking suspension of a proposed rate be verified. See 49 CFR 1100.42(f).

(e) Upon notification of a proceeding instituted upon the Commission's own initiative to investigate whether an existing or proposed rate is unreasonably high, the interested carrier or carrier shall file, within 20 days from the service date of the order instituting said investigation, a verified statement containing, to the extent available and if not previously furnished by the carrier(s), evidence upon which a market dominance determination may be based, including but not limited to the information outlined in §1109.1(a) and (b). Replies, if any, directed to the issue of market dominance, should be filed within 20 days of the date for the filing of the carrier statement.

(f) In a proceeding involving a determination as to market dominance wherein the evidence adduced establishes that the rate in issue has been discussed, considered, or approved under a rate bureau agreement filed with the Commission pursuant to section 5a or 5b of the Interstate Commerce Act, a rebuttable presumption will arise that a carrier participating in the rate or in such discussion or consideration does not provide effective competition to the proponent rail carrier for the involved traffic or movement.

(g) In a proceeding involving a determination as to market dominance wherein the evidence adduced establishes one of the following situations, a rebuttable presumption that the carrier whose rate is in issue has market dominance over the involved traffic or movement will arise: (1) where the proponent carrier has handled 70 percent or more of the involved traffic or movement during the preceding year; the market share of the proponent will be deemed to include the share of any affiliates, and of any carrier participating in the rate or with whom the proponent carrier has discussed, considered, or approved the rate in issue; (2) where the rate in issue exceeds the variable cost of providing the service by 60 percent or more; and, (3) where affected shippers or consignees have made a substantial investment in rail-related equipment or facilities which prevents or makes impractical the use of another carrier or mode.

STATUTORY APPENDIX

The Interstate Commerce Act, codified at 49 U.S.C. § 10709 (Supp. V 1981), provides:

(a) In this section, "market dominance" means an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies.

(b) When a rate for transportation by a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title is challenged as being unreasonably high, the Commission shall determine, within 90 days after the start of a proceeding under section 10707 of this title to investigate the lawfulness of that rate, whether the carrier proposing the rate has market dominance over the transportation to which the rate applies. The Commission may make that determination on its own initiative or on complaint. A finding by the Commission that the carrier does not have market dominance is determinative in a proceeding under this subtitle related to that rate or transportation unless changed or set aside by the Commission or set aside by a court of competent jurisdiction.

(c) When the Commission finds in any proceeding that a rail carrier proposing or defending a rate for transportation has market dominance over the transportation to which the rate applies, it may then determine that rate to be unreasonable if it exceeds a reasonable maximum for that transportation. However, a finding of market dominance does not establish a presumption that the proposed rate exceeds a reasonable maximum. This subsection does not limit the power of the Commission to suspend a rate under section 10707(c) of this title. However, if the Commission has found that a carrier does not have market dominance over the transportation to which the rate ap-

plies, the Commission may suspend an increase in that rate as being in excess of a reasonable maximum for that transportation only if it specifically changes or sets aside its prior determination of market dominance.

(d)(1) In this subsection—

(A) “fixed and variable cost” means all cost incurred by rail carriers in the transportation of freight, but limiting the return on equity capital to a rate equal to the embedded cost of debt.

(B)(i) “cost recovery percentage” means the lowest revenue-variable cost percentage which, if all movements that produced revenues resulting in revenue-variable cost percentages in excess of the cost recovery percentage are deemed to have produced only revenues resulting in the cost recovery percentage, would produce revenues which would be equal, when combined with total revenues produced by all other traffic transported by rail carrier, to the total fixed and variable cost of the transportation of all traffic by rail carrier.

(ii) for purposes of determining the cost recovery percentage only, “revenue-variable cost percentage” means the quotient, expressed as a percentage figure, obtained by dividing the total revenues produced by the transportation of all traffic received by rail carriers for rail transportation by the total variable cost of such transportation.

(2) In making a determination under this section, the Commission shall find that the rail carrier establishing the challenged rate does not have market dominance over the transportation to which the rate applies if such rail carrier proves that the rate charged results in a revenue-variable cost percentage for such transportation that is less than —

(A) 160 percent during the period beginning on the effective date of the Staggers Rail Act of 1980 and end-

which would contribute to the going concern value of such a carrier shall be found to be unjust or unreasonable, or not shown to be just and reasonable, on the ground that such rate is below a just or reasonable minimum for the service rendered or to be rendered. A rate which equals or exceeds the variable costs (as determined through formulas prescribed by the Commission) of providing a service shall be presumed, unless such presumption is rebutted by clear and convincing evidence, to contribute to the going concern value of the carrier or carriers proposing such rate (hereafter in this paragraph referred to as the 'proponent carrier'). In determining variable costs, the Commission shall, at the request of the carrier proposing the rate, determine only those costs of the carrier proposing the rate and only those costs of the specific service in question, except where such specific data and cost information is not available. The Commission shall not include in variable cost any expenses which do not vary directly with the level of service provided under the rate in question. Notwithstanding any other provision of this part, no rate shall be found to be unjust or unreasonable, or not shown to be just and reasonable, on the ground that such rate exceeds a just or reasonable maximum for the service rendered or to be rendered, unless the Commission has first found that the proponent carrier has market dominance over such service. A finding that a carrier has market dominance over a service shall not create a presumption that the rate or rates for such service exceed a just and reasonable maximum. Nothing in this paragraph shall prohibit a rate increase from a level which reduces the going concern value of the proponent carrier to a level which contributes to such going concern value and is otherwise just and reasonable. For the purposes of the preceding sentence, a rate increase which does not raise a rate above the incremental costs (as determined through formulas prescribed by the Commission) of rendering the service to which such rate applies

shall be presumed to be just and reasonable.

"(c) As used in this part, the terms —

"(i) 'market dominance' refers to an absence of effective competition from other carriers or modes of transportation, for the traffic or movement to which a rate applies; and

"(ii) 'rate' means any rate or charge for the transportation of persons or property.

"(d) Within 240 days after the date of enactment of this subdivision, the Commission shall establish, by rule, standards and procedures for determining, in accordance with section 15(9) of this part, whether and when a carrier possesses market dominance over a service rendered or to be rendered at a particular rate or rates. Such rules shall be designed to provide for a practical determination without administrative delay. The Commission shall solicit and consider the recommendations of the Attorney General and of the Federal Trade Commission in the course of establishing such rules."

The Interstate Commerce Act was revised and codified as Subtitle IV of title 49 of the United States Code by Act of October 13, 1978, Pub. L. No. 95-473, 92 Stat. 1337. Section 3(a) of the Act of October 13, 1978 provided:

(a) Sections 1 [enactment of the Interstate Commerce Act as subtitle IV of title 49 of the United States Code] and 2 [conforming and technical provisions] of this Act restate, without substantive change, laws enacted before May 16, 1978, that were replaced by those sections. Those sections may not be construed as making a substantive change in the laws replaced. Laws enacted after May 15, 1978, that are inconsistent with this Act are considered as superseding it to the extent of the inconsistency.

The Interstate Commerce Act, as revised by Section 1 of the Act of October 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337, 1382-83, codified at 49 U.S.C. § 10709 provided:

(a) In this section, "market dominance" means an absence of effective competition from other carriers or modes of transportation for the transportation to which a rate applies.

(b) When a rate for transportation by a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title is challenged as being unreasonably high, the Commission shall determine, within 90 days after the start of a proceeding under section 10707 of this title to investigate the lawfulness of that rate, whether the carrier proposing the rate has market dominance over the transportation to which the rate applies. The Commission may make that determination on its own initiative or on complaint. A finding by the Commission that the carrier does not have market dominance is determinative in a proceeding under this subtitle related to that rate or transportation unless changed or set aside by the Commission or set aside by a court of competent jurisdiction.

(c) When the Commission finds in any proceeding that a rail carrier proposing or defending a rate for transportation has market dominance over the transportation to which the rate applies, it may then determine that rate to be unreasonable if it exceeds a reasonable maximum for that transportation. However, a finding of market dominance does not establish a presumption that the proposed rate exceeds a reasonable maximum. This subsection does not limit the power of the Commission to suspend a rate under section 10707(c) of this title. However, if the Commission has found that a carrier does not have market dominance over the transportation to which the rate applies, the Commission may suspend an increase in that rate as being in excess of a reasonable maximum for that transportation only if it specifically changes or sets aside its prior determination of market dominance.

Section 202 of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, 1900-01 provides:

SEC. 202. Section 10709 of title 49, United States Code, is amended by adding at the end thereof the following new subsection:

"(d)(1) In this subsection—

"(A) 'fixed and variable cost' means all cost incurred by rail carriers in the transportation of freight, but limiting the return on equity capital to a rate equal to the embedded cost of debt.

"(B)(i) 'cost recovery percentage' means the lowest revenue-variable cost percentage which, if all movements that produced revenues resulting in revenue-variable cost percentages in excess of the cost recovery percentage are deemed to have produced only revenues resulting in the cost recovery percentage, would produce revenues which would be equal, when combined with total revenues produced by all other traffic transported by rail carrier, to the total fixed and variable cost of the transportation of all traffic by rail carrier.

"(ii) for purposes of determining the cost recovery percentage only, 'revenue-variable cost percentage' means the quotient, expressed as a percentage figure, obtained by dividing the total revenues produced by the transportation of all traffic received by rail carriers for rail transportation by the total variable cost of such transportation.

"(2) In making a determination under this section, the Commission shall find that the rail carrier establishing the challenged rate does not have market dominance over the transportation to which the rate applies if such rail carrier proves that the rate charged results in a revenue-variable cost percentage for such transportation that is less than—

"(A) 160 percent during the period beginning on the effective date of the Staggers Rail Act of 1980 and end-

ing September 30, 1981;

"(B) 165 percent during the period beginning October 1, 1981, and ending September 30, 1982;

"(C) 170 percent during the period beginning October 1, 1982, and ending September 30, 1983;

"(D) 175 percent or the cost recovery percentage, whichever is less, during the period beginning October 1, 1983, and ending September 30, 1984; and

"(E) the cost recovery percentage, during each 12-month period beginning on or after October 1, 1984.

For purposes of subparagraphs (D) and (E) of this paragraph, the cost recovery percentage shall in no event be less than a revenue-variable cost percentage of 170 percent or more than a revenue-variable cost percentage of 180 percent.

"(3) For purposes of determining the revenue-variable cost percentage for a particular transportation, variable costs shall be determined pursuant to section 10705a(m)(1) of this title, with adjustments specified by the Commission. A rail carrier may meet its burden of proof under this subsection by establishing its variable costs in accordance with such section 10705a(m)(1), but a shipper may rebut that showing by evidence of such type, and in accordance with such burden of proof, as the Commission shall prescribe.

"(4) A finding by the Commission that a rate charged by a rail carrier results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than the applicable percentage under paragraph (2) of this subsection does not establish a presumption that (A) such rail carrier has or does not have market dominance over such transportation, or (B) the proposed rate exceeds or does not exceed a reasonable maximum.

"(5)(A) Within 180 days after the effective date of the Staggers Rail Act of 1980 and on an annual basis thereafter, the Commission shall determine the cost recovery percentage for the transportation of all traffic received by rail carriers. The Commission shall make such determination after considering each individual revenue-variable cost percentage resulting from the revenues and costs of a valid and reliable statistical sample of all movements of commodities transported by class I rail carriers during the most recent calendar year for which such information is available.

"(B) If, on the basis of calculations under subparagraph (A) of this paragraph, the Commission determines that revenues earned by all class I rail carriers during the previous calendar year do not exceed the fixed and variable costs of such carriers, then the cost recovery percentage for purposes of this section shall be deemed to be equal to the cost recovery percentage last determined by the Commission.

"(C) The Commission shall, in its annual report submitted to the Congress under section 10311 of this title, set forth the cost recovery percentage determined for that year under subparagraph (A) of this paragraph."

Section 205 of the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895, 1905-06 provides:

Sec. 205. (a)(1). The Interstate Commerce Commission shall commence a proceeding for purposes of determining whether, and to what extent, product competition should be considered in proceedings under subtitle IV of title 49, United States Code, to determine the reasonableness of rail carrier rates. The Commission shall complete its proceeding under this subsection within 230 days after the effective date of this Act.

(2)(A) For purposes of this subsection, the term "product competition" means the availability to a consignee, at a

competitive delivered cost and in sufficient quantities, of products or commodities which are of the same type as the commodity or product to which the rate in question applies, without regard to whether such products or commodities are available from the same or a different origin as those to which the rate applies.

(B) In determining the availability of alternative sources of a particular commodity for purposes of this subsection, such commodity must be capable, by reason of similar specifications, of being effectively utilized by the consignee.

(C) In determining the availability of alternative sources of coal for purposes of this subsection, such coal must be capable, by reason of similar specifications such as Btu's, sulfur content, and ash content, of being effectively utilized by the consignee.

(D) For purposes of this subsection, any coal imported in the United States for the generation of electricity by utilities shall not be taken into account in the determination of whether coal is available to a consignee from another source.

(3)(A) Nothing in this subsection shall be construed as requiring the Commission to modify its standards for the determination of the reasonableness of rail carrier rates under existing law and procedures.

(B) Nothing in this subsection shall be construed as altering the meaning, use, or interpretation by the Commission, the courts, or any party of the term "market dominance", as defined in section 10709(a) of title 49, United States Code. The enactment of this subsection shall not be considered by the Commission in any proceeding, or by any court on an appeal from that or any other proceeding, to determine the proper scope of the term "market dominance" or whether there is market dominance over the transportation to which any particular rate applies.

(b)(1) Section 10704(a)(2) of title 49, United States Code, is amended by inserting "and revise as necessary" immediately after "shall maintain".

(2) Section 10704(a) of title 49, United States Code, is amended by adding at the end thereof the following new paragraphs:

"(3) The Commission shall conclude a proceeding under paragraph (2) of this subsection within 180 days after the effective date of the Staggers Rail Act of 1980 and thereafter as necessary.

"(4) On the basis of the standards and procedures under paragraph (2) of this subsection, the Commission shall, within 180 days after the effective date of the Staggers Rail Act of 1980 and on an annual basis thereafter, determine which rail carriers are earning adequate revenues."

The Interstate Commerce Act, codified at 49 U.S.C. §10701a (b)(1) (Supp. V 1981), provides:

(b)(1) If the Commission determines, under section 10709 of this title, that a rail carrier has market dominance over the transportation to which a particular rate applies, the rate established by such carrier for such transportation must be reasonable.
